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IN THE

Supreme Court of the United States.

For D.C.

OCTOBER TERM, 1899.

Filed Jan. 25, 1900.

THOMAS W. HYDE,
PLAINTIFF IN ERROR,

v.

BISHOP IRON COMPANY, ET AL.,
DEFENDANTS IN ERROR.

} No. 126.

In Error to the Supreme Court of the State of Minnesota.

BRIEF FOR DEFENDANTS IN ERROR.

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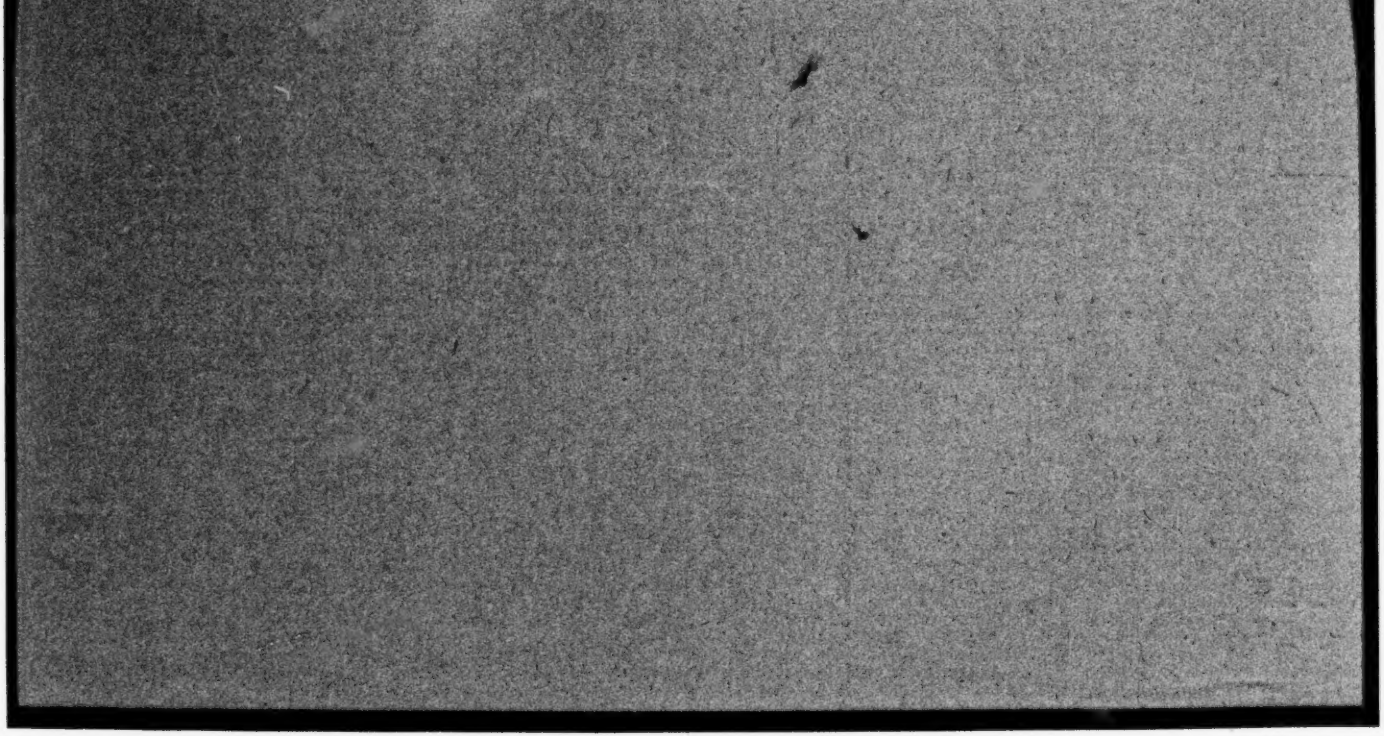

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BRIEF FOR DEFENDANT IN ERROR, THE BISHOP IRON COMPANY.

STATEMENT OF CASE.

The case at bar is ejectment, or the equivalent possessory action for recovery of real estate under the laws of Minnesota, brought by the defendant in error, the Bishop Iron Company, against the plaintiff in error, Thomas W. Hyde. The case reaches this court under writ of error to the Supreme Court of the State of Minnesota after final judgment by said last-mentioned court in favor of the plaintiff

below. As the status of the case in this court is regarded as somewhat anomalous, a comparatively full statement thereof, on behalf of the defendants in error, may not be inappropriate.

The case twice reached the Supreme Court of the State, and was twice therein decided. The original transcript certified to this court responsive to the writ of error embraces both transcripts taken to the Supreme Court of the State from the trial court, being designated, respectively, "Paper Book, October Term, 1896," and "Paper Book, October Term, 1897." The last above mentioned "paper book" only (that of 1897) appears in the printed transcript, the one of 1896 being omitted under the operation of rule 10.

In the following statement, a few references are made to the unprinted transcript of 1896, by the pages or folios of the original transcript on file in this court, for the purposes merely of an orderly history of the proceedings by consecutive dates.

April 3, 1895, the Bishop Iron Company, defendant in error, filed in the District Court for the Eleventh Judicial District of the State, its complaint against Thomas W. Hyde, plaintiff in error. This complaint, in legal substance, is a declaration in ejectment, averring in the usual form: (*a*) the corporate capacity of the plaintiff; (*b*) that plaintiff is the owner in fee of an undivided thirteen twenty-fifths ($\frac{13}{25}$) and the lessee from the fee owners for the term of thirty years of the remaining twelve twenty-fifths ($\frac{12}{25}$) of the demanded premises, and that under such ownership and lease plaintiff is entitled to immediate, sole and exclusive possession; (*c*) that defendant wrongfully entered into and took possession of said premises, and still so holds and possesses the same; (*d*) that plaintiff has demanded possession of defendant, which has been refused.

Judgment is therefore demanded for possession of the premises and for costs. (Transcript, pp. 10, 11.)

April 27, 1895, Thomas W. Hyde, sued as above, filed his answer, denominated in the paper itself an "answer and cross-petition." (Original Transcript, pp. 87 *et seq.*; Index to Printed Transcript, p. II.)

May 4, 1895, the defendant, Hyde, filed, with an accompanying affidavit, a motion for an order requiring certain persons, alleged to be necessary parties, to appear and answer "the cross-petition or counter claim" of said defendant. (Original Transcript, pp. 112 *et seq.*; Index, Printed Transcript, p. II; Printed Transcript, p. 11.)

June 17, 1895, the court passed an order bringing in all of the additional parties named. (Original Transcript, p. 115; Index, Printed Transcript, p. II.)

Certain of the persons, so made additional parties, appeared and moved to set aside the said order as improvidently issued; this motion prevailed; the defendant, Hyde, appealed from this order of the trial court to the Supreme Court of the State, which last-mentioned court, in its opinion when the case was brought before it on the first transcript, that of 1896, affirmed this order of the District Court. (Transcript, pp. 43, 48.)

These particular persons do not, at any subsequent stage of the proceedings, seem to have been treated as parties to the cause.

The motion of May 4, 1895, above mentioned, to bring in additional parties, omitting, however, the accompanying affidavit and the names of those in respect to whom the order was vacated, appears in the printed transcript. The additional parties named are Fred F. Huntress, Samuel C. Brown, Frank R. Webber, William C. Sherwood, Joseph H. Sharp, Christian Kortgard, Henry A. Smith, Herbert W. Coffin, A. L. Warner, John P. Johnson, N. J. Miller, and Frank W. Forman. (Transcript, p. 11.)

The order of June 17, 1895, above mentioned, bringing in said parties, changed so as to omit the names of those in respect to whom the original order was vacated, is found in the printed record. (Transcript, p. 12.)

July 1, 1895, Fred F. Huntress, Samuel C. Brown, Henry A. Smith, Joseph H. Sharp, John P. Johnson, and N. J. Miller, six of the additional parties brought into the case by the order of June 17, 1895, filed a joint and several demurrer to the counter claim of the defendant for the reasons: (*a*) that it did not allege any cause of counter claim against the plaintiff, or any cause of action against the defendants to such cross-petition; (*b*) that upon its face it showed that Hyde had no right or title to, or interest in, the premises. (Original Transcript, p. 172; Printed Transcript, pp. 32, 33.)

July 10, 1895, Frank R. Webber, another of the persons made defendants to the cross-petition, filed general demurrer to the entire answer of the defendant. (Transcript, p. 34.)

December 7, 1895, the defendant, Hyde, under leave of court first obtained (Original Transcript, pp. 123 to 128, 171; Index to Printed Transcript, p. II), filed an amended answer and cross-petition (Transcript, pp. 13 to 32). This defence is comprised of two separate and distinct subdivisions, both as to substance and form, distinguished from each other by numerical designation, viz:

I. A specific denial or traverse of all the allegations of the complaint except demand of possession and refusal thereof, which are admitted.

II. An equitable defence, or counter-claim, stated, in introduction, to be averred against the plaintiff, the various persons above named as additional parties, and Frank B. Forman, not theretofore mentioned in the case. In this equitable defense, or counter-claim, the defendant, at great length, and with considerable particularity, sets up what is averred to be an equitable title founded upon an alleged

pre-emption claim to the premises initiated, as averred, in 1884. For present purposes it is sufficient to state that the defendant, in this subdivision, avers that he is a qualified pre emptor; that as such he settled upon these premises, with other lands, in 1884; that his right thereto was contested by other claimants; that several hearings were had before the officials of the Land Department, to which proceedings defendant was a party, and that the final result of these proceedings was one or more decisions of the Secretary of the Interior denying the validity of defendant's claim, and, as to these particular premises, the issue of a patent under which the plaintiff claims title. It is averred in this subdivision that these decisions of the Secretary were erroneous, and that defendant, under the averments of the counter-claim, is the equitable owner of the premises.

December 7, 1895, the plaintiff filed demurrer to that part of the answer and cross-petition setting up the equitable defence. The date given in the transcript as that of the filing of this demurrer, December 17, 1895, (Transcript, p. 32) is obviously a clerical error, as the order of the court disposing of the same was December 10, 1895 (see post.) and, as shown by the original transcript (page 172), it was served on opposite counsel December 7, 1895. This demurrer was in the following words (Transcript, p. 32):

"Plaintiff demurs to that part of the amended answer and cross-petition of the defendant set forth in subdivision 2 of said amended answer and cross-petition containing new matter pleaded as a counter-claim, on the ground that the facts therein stated do not, upon their face, constitute a defense."

At some date not shown by the transcript, but apparently subsequent to the filing of the amended answer, Frank W. Forman, another of the persons made defendants to the cross-petition, and Frank B. Forman, mentioned

in said amended cross-petition, filed their separate demurrer to said cross-petition upon the grounds: (*a*) that the court had no jurisdiction of the subject of the action; (*b*) that the cross-petition did not state facts sufficient to constitute a cause of action. (Transcript, p. 33.)

December 10, 1895, the District Court, upon hearing thereof, sustained the demurrer of the plaintiff to the cross-petition or counter-claim, and also the demurrer of Huntress, Brown, Smith, Sharp, Miller, and Johnson, treating, considering, and denominating the latter as a demurrer to the amended answer and counter-claim. (Transcript, p. 33.)

No action by the court appears from the record to have been taken at this time upon the demurrers of Frank R. Webber and Frank W. Forman and Frank B. Forman, above noted.

February 4, 1896, the defendant, Hyde, filed appeal to the Supreme Court of the State, from the order last above recited, and also from the order hereinbefore mentioned vacating the order making certain parties defendants to the cross-petition. (Original Transcript, pp. 175 *et seq.*; Index to Printed Transcript, p. III.)

July 24, 1896, the Supreme Court of the State, upon consideration of this appeal, in an elaborate opinion, affirmed the order of the District Court sustaining the above demurrers, and in view of this action, also affirmed, without discussion of the merits, the other order covered by the appeal. (Transcript, pp. 42 to 48.)

September 19, 1896, the case having meanwhile been remanded to the District Court, under the opinion of the Supreme Court of the State above noted, the District Court passed an order sustaining the demurrers hereinbefore mentioned, filed by Frank R. Webber, Frank W. Forman, and Frank B. Forman. This order recites and treats said demurrers as having been filed to the "amended answer and counter-claim." (Transcript, p. 34.)

October 3, 1896, the plaintiff, the Bishop Iron Company, the case, as above stated, having been remanded under the opinion of the Supreme Court sustaining the company's demurrer to the counter-claim of the defendant (Transcript, Case or Bill of Exceptions, p. 36), filed a replication to the residue of the answer, to wit, to subdivision I, being the traverse to the formal declaration in ejectment. This replication is in the following words (Transcript, p. 34):

"The plaintiff, for reply to the amended answer of Thomas W. Hyde, denies each and every allegation in the first subdivision of said amended answer, constituting the first four folios of said answer, except such facts as are alleged in plaintiff's complaint. Wherefore plaintiff demands judgment as in its complaint."

December 4, 1896, the cause, as thus put at issue by the above-noted answer and replication, having been tried before a judge of the District Court without a jury, the court filed its findings of fact and conclusions of law in favor of the plaintiff and directed judgment accordingly. (Transcript, pp. 35, 36.)

December 17, 1896, defendant filed a motion to vacate said findings, decision, and order, and for a new trial upon the grounds (Transcript, pp. 37, 38):

(1) Because not justified by the evidence.
(2) Because contrary to law.
(3) Errors of law occurring at trial.
(4) The order sustaining demurrer to counter-claim.

December 19, 1896, the court denied the foregoing motion. (Transcript, p. 38.)

December 19, 1896, the motion for new trial having been denied, the court settled a case or bill of exceptions, which is in substance as follows (Transcript, pp. 36, 37):

(1) The case was tried before one of the judges of the District Court, November 30, 1896, a jury having been waived.

(2) The mandate of the Supreme Court of the State affirming the action of the District Court sustaining the demurrer to defendant's amended counter-claim appeared on file in the District Court.

(3) Thereupon the plaintiff offered in evidence a patent of the United States to James H. Warren, dated December 26, 1894, covering the premises in suit, to which offer defendant objected as incompetent, immaterial, and irrelevant, and also upon the ground that said patent was issued without authority and void for the reasons set up in defendant's counter-claim. This objection was overruled and defendant duly excepted.

(4) The plaintiff thereupon offered in evidence deeds of conveyance from Warren and wife and mesne conveyances and instruments which, upon their face, conveyed and vested the title which Warren received under said patent, in the plaintiff, as alleged in the complaint. To these offers defendant objected as incompetent, immaterial, and irrelevant; such objections were overruled and defendant excepted.

March 13, 1897, the District Court filed amended findings of fact. These amended findings are substantially the same as the originals filed December 4, 1896 (*supra*), the facts, however, being more carefully and particularly stated.

As amended, the findings are substantially as follows (Transcript, pp. 38, 39):

(1) That plaintiff is a corporation.

(2) That plaintiff, prior to suit, acquired legal title to thirteen twenty-fifths ($\frac{13}{25}$) of said premises, and is now seized thereof by mesne conveyances from the patentee of the United States; and had also acquired, from the persons holding the legal title under said patent, a lease for the remaining twelve twenty-fifths ($\frac{12}{25}$) of said land for thirty years from March 4, 1889, with right to immediate

possession, and that the defendant, Hyde, has no title to or interest in said premises.

(3) That the defendant Hyde was and is in wrongful and unlawful possession, without color of title thereto or interest therein, and that possession was demanded by plaintiff and refused.

(4) That the persons who conveyed and leased to plaintiff, as above, acquired said lands by conveyances executed by person or persons to whom the premises were patented by the United States.

(5) That the defendant Hyde does not own, hold, or claim to own or hold, under any patent; or under any other instrument of conveyance executed by any one claiming by, through, or under any person having legal title.

As conclusions of law, upon the above facts, the court held (Transcript, p. 39):

(1) That plaintiff is owner in fee of an undivided thirteen twenty-fifths ($\frac{13}{25}$) of the land and lessee of the residue from the owners thereof.

(2) That defendant is in wrongful possession of and has no title to or interest in the premises.

(3) That plaintiff is entitled to immediate possession.

(4) That plaintiff is entitled to judgment.

March 17, 1897, in pursuance of the foregoing proceedings, judgment was entered in favor of the plaintiff, the Bishop Iron Company, for possession and costs. (Transcript, pp. 39, 40.)

March 17, 1897, the defendant Hyde and Frank W. Forman and Frank B. Forman entered into a stipulation that notice of entry of judgment was waived and that the clerk might enter said judgment, subject to all objections except such notice. (Transcript, p 40.)

March 19, 1897, judgment against Hyde, in favor of all the parties who, at any time, as hereinbefore recited, had filed demurrers to defendant's cross-bill, was entered. This

judgment recites that the action had been brought on to be heard upon the demurrer of the parties, naming them; that the court had heard counsel thereon, duly considered the same and filed its order sustaining said demurrer; that no appeal had been taken from said order and that the time for such appeal had expired. Thereupon, upon motion of counsel and under the stipulation (*supra*) filed on behalf of Hyde, the judgment orders and decrees:

(1) That Hyde has no right, title, estate, interest, or property in or to any lands described in the complaint, as against said demurring parties, naming them.

(2) That Hyde is barred and estopped from having or claiming any right, title, interest, estate or property in or to any part of said lands adverse to said demurring parties.

September 10, 1897, the defendant Hyde filed appeal to the Supreme Court of the State from both of the judgments above noted. (Transcript, pp. 41, 42.)

No assignment of errors upon this appeal to the Supreme Court of the State appears in the transcript now before this court.

April 22, 1898, the Supreme Court of the State filed its opinion, affirming the judgment of the District Court. This opinion is very brief, and holds (Transcript, p. 49):

(1) That every question presented by the first ten assignments of error was covered by the former decision.

(2) That by the eleventh assignment it was claimed that the judgment entered by the clerk in favor of the demurring parties, other than plaintiff, was not the proper one under the order sustaining the demurrers; deciding which the court held that the error complained of was not that of the court but of the clerk; that the remedy was not by appeal but by application to the lower court to correct the judgment, and, unless such remedy was followed, the question could not be reviewed on appeal.

April 18, 1898, the appeal was heard and submitted to the court upon paper book and briefs of counsel. (Transcript, pp. 53.)

May 3, 1898, order was entered affirming, in all things, the judgment below, and directing judgment accordingly. (Transcript, p. 52.)

May 3, 1898, judgments of the Supreme Court, affirming, respectively, both of the judgments below, were entered. (Transcript, pp. 50, 51, 52.)

July 28, 1898, upon application by defendant below to the Chief Justice of the Supreme Court of the State, which was allowed, writ of error to that court issued in the usual form. (Transcript, pp. 1, 2, 3.)

July 28, 1898, in connection with his application for writ of error, and subsequently, October 1, 1898, under section 9, rule 10, of this court, plaintiff in error filed his assignment of errors relied upon in this court. (Transcript, pp. 4 to 7; 55 to 59.)

From the foregoing detailed statement of the proceedings in the case, it appears:

First. As to the Bishop Iron Company. That the company filed a declaration in ejectment; that Hyde answered, denying in part and confessing as to part, coupling this with a separate, independent, equitable defence pleaded by way of cross-petition; that to this cross-petition, as amended, the Bishop Iron Company demurred; that the trial court sustained this demurrer and Hyde appealed; that upon this appeal, the Supreme Court of the State affirmed the order below and remanded the case to the trial court; that thereupon the Bishop Iron Company filed replication to so much only of the answer of Hyde as was not previously demurred to; that thereupon the cause proceeded to trial upon this issue before the court without a jury; that upon this trial the plaintiff, under objection and exception, introduced certain evidence and the defendant offered none; that the court thereupon filed its findings of fact and conclusions of law in favor of the

Bishop Iron Company, overruled a motion for new trial, settled a case or bill of exceptions and ordered and entered judgment; that from this judgment Hyde appealed to the Supreme Court of the State; that upon this appeal, the last-mentioned court affirmed the judgment below, and that thereupon Hyde sued out his writ of error, bringing the case to this court.

Second. As to the other nine defendants in error. These persons were made parties defendant to the cross-petition and demurred thereto. Six of them—Huntress, Brown, Smith, Sharp, Miller, and Johnson—demurred July 1, 1895, prior to the order of the District Court sustaining the demurrer of the Bishop Iron Company, December 10, 1895. (Transcript, pp. 32, 33.)

Third. One other of said parties, Frank R. Webber, demurred prior to said order December 10, 1895 (Transcript, p. 34), but does not seem to have been mentioned in the subsequent proceedings, except in the opinion of the court, where his name appears in the caption. (Transcript, p. 42.)

Fourth. Two other of said parties, Frank W. Forman and Frank B. Forman, filed demurrer, at a date not shown by the record (Transcript, p. 33), but undoubtedly subsequent to the filing of the amended cross-petition.

Fifth. After the trial of the issue between the Bishop Iron Company and Hyde, and judgment thereon, March 17, 1897 (Transcript, pp. 39, 40), the court entered another judgment, March 19, 1897 (Transcript, pp. 40, 41), against Hyde and in favor of all the demurring defendants in error except the Bishop Iron Company. This judgment recited that these parties had demurred; that the court had heard and considered said demurrers and filed its order sustaining the same; that no appeal from said order had been taken, and that the time for filing appeal therefrom had expired; and, thereupon, adjudged in favor of these defendants in error, first, that Hyde had no title; second, that he was bound and estopped from having or claiming any such title. This judgment, so far as these parties are concerned, is the one appealed to the Supreme Court of the State, by that court affirmed, and now here under the writ of error.

The assignment of errors filed in this court apparently assumes that the writ of error brings to this court for review the action of the State courts upon the equitable defense set up in the cross-petition, and, as supplemental to this position, further assumes:

First. That the allegations of such cross-petition are to be here taken as admitted by all the defendants in error; as to the Bishop Iron Company, by its replication to subdivision I of the answer, and as to the other defendants, by their demurrers respectively.

Second. That the opinion of the State court, when the case was first before that tribunal upon demurrer, and before the trial in which the judgment here appealed from was made, is a finding of facts in respect to which assignments of error can be made upon the ground that such finding does not, as claimed, correctly state particular facts as pleaded in the cross-petition.

Then proceeding, plaintiff in error assigns in two subdivisions, I and II, various supposed errors. As consolidated and relied upon in the brief of counsel in this court, they in substance are:

I. That the court erred in deciding that the plaintiff in error was not the equitable owner of the land in question.

II. Ten specific assignments, each alleging some particular error in the opinion of the Supreme Court of the State when the case was first before it on demurrer, the claim, in each instance, being of some error by the court in passing, in this opinion, upon the allegations of the cross-petition.

BRIEF.

On behalf of the defendants in error, we submit the following propositions:

I. Assuming that the writ of error brings to this court

for review the ruling of the court below sustaining the demurrers to the cross-petition or equitable defense, we then submit that this ruling was without error and that the judgment below must, therefore, be affirmed.

II. As no error is assigned, or appears, in respect to the findings of the trial court, the settled case or bill of exceptions, or other matter appearing of record, except such as is predicated upon the validity and efficacy of the equitable defense as pleaded, it follows that if such equitable defense was bad on demurrer, there is here no further question for review.

III. As to all the defendants in error except the Bishop Iron Company, the judgment of the Supreme Court of the State, affirming in all things the judgment of the District Court of March 19, 1897, must be affirmed, because, upon the facts found in said last-mentioned judgment of the trial court, the plaintiff in error had taken no appeal from a previous order sustaining the demurrers and the time for such appeal had then expired.

IV. The writ of error does not bring into this court any question involved in the equitable defense pleaded by plaintiff in error in his cross-petition. All such questions are concluded by the orders and judgments of the court below. And as no error is assigned independently of such equitable defense, and none other appears, the judgment below must be affirmed.

I.

The Demurrers Were Properly Sustained.

Assuming for the purposes only of the point here under discussion, that the ruling of the court below, sustaining the demurrers, is properly before this court, we proceed to

the inquiry whether the cross-petition states a good cause of action or equitable defense.

The legal title of the defendants in error rests upon a patent of the United States, dated December 26, 1894 (Tr., pp. 24, 36), which, by relation, took effect as of the date of the location or entry upon which it was founded, October 15, 1885. (Tr., p. 15.) This title has been sustained by the Circuit Court and the Circuit Court of Appeals (Hartmann *v.* Warren, 76 Fed. Reporter, p. 157) in litigation which has now become final, and it is here admitted that the plaintiff below was entitled to recover unless the plaintiff in error has shown himself to be the equitable owner. (Brief of Counsel, p. 7.)

The facts averred as an equitable defense relate to and arise out of four separate proceedings in the land department, to all of which the plaintiff in error was a party. In these proceedings occurred several decisions of the Commissioner of the General Land Office and Secretary of the Interior. The cross-petition recites the rendition of several of these decisions, but in only two instances gives a copy thereof as an exhibit; and in one instance, at least, a very important decision of the Secretary of the Interior is not even mentioned. Assuming that the court will take judicial notice of these decisions of the land department, in conformity to established authority as we shall hereafter show, the facts averred as an equitable defense, arranged with reference to the several proceedings, respectively, and in chronological order, are substantially as follows:

(a) *Hyde's contest against Sioux Half-Breed locations.*

(1) That, June 16, 1883, the particular governmental section of land in which the premises in controversy are situated being still unsurveyed, one Frank W. Eaton,

ostensibly as attorney in fact for one Orille Moreau, located a certain portion thereof by metes and bounds with two certain pieces of Sioux Half-Breed scrip, Nos. 19 D. and 19 E. This location, upon subsequent survey of the land and filing of plat thereof, about July 20, 1885 (Tr., p. 14), was adjusted, in the name of Orille Stram, née Moreau, so as to embrace technical tracts, according to the governmental subdivisions, as follows: No. 19 D., for lots 3, 5, and 6, and S.E. ¼ N.W. ¼ of Section 30, Tp. 63 N., R. 11 W.; No. 19 E., for lots 1 and 2, S.W. ¼ N.E. ¼, and N.W. ¼ S.E. ¼ of said section. (Tr., p. 16.) The act of Congress under which this scrip was issued, as the court will judicially notice, is that of July 17, 1854 (10 Stat. 304), which declares that no transfer or conveyance of any certificate or scrip issued under its provisions shall be valid, and that the same shall, when applied to unsurveyed lands, be located only on tracts "upon which they (the mixed-bloods) have respectively made improvements."

(2) That, August 20, 1884, Hyde, being a qualified pre-emptor, made settlement upon the premises involved in the case at bar, being then vacant and unoccupied, with intent to acquire title thereto under the pre-emption law. This tract, upon the subsequent survey hereinbefore mentioned, became the N.E. ¼ S.W. ¼ of the section. Immediately after such settlement, the defendant erected a house upon the tract, cleared and cultivated part of the land and has ever since resided upon and held possession of the same. (Tr., pp. 13, 14.) This particular forty-acre tract adjoins upon its north line one of the forties located by Eaton, in 1883, with Sioux Half Breed scrip, No. 19 D., as hereinbefore mentioned.

(3) That, October 9, 1884, Hyde filed in the local land office a duly corroborated affidavit of contest against the Sioux Half-Breed Scrip location, No. 19 D. upon the ground

that no improvements had ever been made upon the land by the scripee, either in person or by agent, and in support of such charge filed an affidavit of said scripee denying that she had ever given any power of attorney to Eaton; and that, in refutation of said charge, the said Eaton filed in said office certain affidavits and other papers. (Tr., pp. 16, 17.)

(4) That, October 9, 1884, one Angus McDonald filed a like contest against the Sioux Half-Breed Scrip location No. 19 E., and that Eaton in like manner replied. (Tr., p. 17.) These two applications to contest were transmitted by the local officers to the General Land Office, October 31, 1884. (Tr., Ex. A, p. 25.)

(5) That, July 20, 1885, after the filing of the township plat, Hyde made application at the Duluth Land Office to file a pre-emption declaratory statement, which application embraced the forty acre tract involved in the case at bar, not covered by either of the Sioux Half-Breed locations, viz., the N.E. ¼ S.W. ¼, and also three of the forty-acre tracts covered by Scrip No. 19 D., against which he had, as aforesaid, brought contest, viz., lots 5 and 6 and S.E. ¼ N.W. ¼ of the section, the whole forming a compact body of one hundred and sixty acres of contiguous or connected forty-acre tracts; that upon tender of his pre-emption declaratory statement, as aforesaid, the local officers informed him that they would reject the same, unless limited to the tract not covered by the Sioux Half-Breed location; that he thereupon informed said officers that his house and cultivation were upon said last-mentioned tract, and that he intended to claim the same, whether successful or not, in his contest for the other three forties; that the land officers retained his application and informed him that if he was a *bona-fide* settler, he had done all that was necessary to protect his rights; that subsequently, on the same day, the

register of said land office endorsed upon said application a formal rejection thereof as to the three forties covered by the scrip location, allowing thirty days for appeal; and that thereafter, August 20, 1885, the local officers having retained possession of the paper, endorsed thereon, "Filed August 20, 1885." (Tr., pp. 14, 15.)

(6) That within thirty days after July 20, 1885, the date of the rejection of his application as aforesaid, but without knowledge of the endorsement that day placed thereon, relying upon what had been said to him by the local officers and supposing his application had been entirely rejected, he filed an appeal to the Commissioner of the General Land Office, which was transmitted to Washington by the local officers August 20, 1885. (Tr., p. 15.)

(7) That, November 14, 1885, the Commissioner of the General Land Office, acting upon the applications of Hyde and McDonald to contest the two Half-Breed Scrip locations, Nos. 19 D and 19 E, ordered a hearing between the parties. (Tr., p. 17.) Copy of this order of the Commissioner accompanies the cross-petition as "Exhibit A." (Tr., pp. 25, 26.) It recites the Sioux Half-Breed Scrip locations; that the local officers had transmitted the applications of McDonald and Hyde to contest the same upon the grounds hereinbefore stated, and that Eaton had also submitted various enumerated papers in reply. The Commissioner thereupon orders a hearing "that the respective parties may have an opportunity to submit such proof as they may have in support of their allegations and that this office may be possessed of all the facts possible in the matter." (Tr., p. 26.)

(8) That, November 17, 1885, the local officers, acting under direction of the Commissioner, ordered a hearing and fixed the date of the same for April 6, 1886. (Tr., p. 17.) Separate notices of this hearing were given McDonald and

Hyde, copies of which accompany the cross-petition as Exhibits B and C. (Tr., pp. 26, 27.) These notices advise the parties that upon the allegations made by them against the scrip locations, the Commissioner has ordered the register and receiver to inquire into and determine the truth of the same and accordingly summons them for that purpose.

(9) That, April 6, 1886, pursuant to the notices aforesaid, the contest of the said Angus Mc Donald was heard before the local officers, all parties appearing; that on said hearing, there was admitted, erroneously and contrary to law, certain irrelevant, incompetent, and immaterial testimony, which is recited in full. (Tr., pp. 17, 18, 19.) It consists of testimony by S. F. White, Hyde, and McDonald, all showing, or tending to show, the existence of a contract in writing between Hyde and McDonald, upon one part, and White and James H. Powers, upon another part, under which, in violation of the pre-emption law, the title to be acquired to their pre-emption claims by Hyde and McDonald was to inure, in part, to White, or to White and Powers. The cross-petition avers that the testimony quoted, as above, was all the evidence taken upon said hearing relative to said contract.

(10) That at the conclusion of the said hearing in the McDonald case, all parties to the case of Hyde against the location made with No. 19 D. entered into the following stipulation of record (Tr., pp. 19, 20):

"It is hereby stipulated and agreed upon that this testimony shall be considered in determining the validity of both locations of scrip 19 D. and 19 E."

(11) That no testimony, except under the above stipulation, was taken in said Hyde contest against Scrip No. 19 D.; that the testimony under the said stipulation

was only for the purpose of determining the validity of the scrip location, and that the validity of such location was the only issue in the case. (Tr., p. 20.)

(12) That upon the testimony taken in said cases, the local officers decided that both said scrip locations were valid, and thereupon the said Hyde and McDonald appealed to the Commissioner of the General Land Office. (Tr., p. 20.)

(13) That, August 4, 1888, the appeals taken by Hyde and McDonald from the decision of the local officers, in their contests against the Sioux Half-Breed locations, came on to be heard before the Commissioner of the General Land Office; that the Commissioner, by decision of that date, canceled said scrip locations on the ground that the evidence showed no improvements upon the land by the scripee, and that from this decision Eaton appealed to the Secretary of the Interior. (Tr., p. 20.) The cross-petition also avers that this decision rejected the application of Hyde, so far as the same related to the tracts covered by the Sioux Half-Breed location, but this averment is not supported by anything found in the decision itself, which is made Exhibit D of the petition. (Tr., pp. 28 to 32.)

(14) That, February 18, 1889, the then Secretary of the Interior (Hon. Wm. F. Vilas) having before him the appeal by Eaton from the decision of the Commissioner of August 4, 1888, and the appeals by Hyde and McDonald from the decision of the Register and Receiver, in the contest of said Hyde and McDonald against the Sioux Half-Breed scrip locations, affirmed the said decision of the Commissioner; that the appeal by Hyde from the decision rejecting his application to file as a pre-emptor had, so far as the lands involved in that proceeding were concerned, been disposed of by the Commissioner's decision and was not before the Secretary; that McDonald had exhausted his right

and that that fact was called to the attention of the Secretary; that, notwithstanding the premises, the Secretary, erroneously and contrary to law, determined that the claims of said Hyde and McDonald were before him in said proceeding; that so adjudging, the Secretary, erroneously and contrary to law, further decided that the testimony before him showed that it was impossible for Hyde to make the affidavit required by Section 2262 of the Revised Statutes of the United States to the effect that he had not "directly or indirectly, under any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the Government of the United States should inure in whole or in part to the benefit of any person except himself," and that consequently his pre-emption claim should be rejected and the land declared open to disposition to the first legal applicant. The cross-petition, in this connection, further avers that this decision of the Secretary was in consequence of mistake in misapprehending and misquoting the testimony of Hyde to the effect that when he proved up he was to secure White "a half interest," instead of "on a half interest." (Tr., pp. 20, 21.) As hereinbefore noted, the Commissioner's decision of August 4, 1888, made part of the cross-petition, does not dispose of the pre-emption claim of Hyde, and is, therefore, directly repugnant to the averment in that regard above recited. No copy of the decision of Secretary Vilas above referred to accompanies the cross-petition, and it does not appear in the published decisions of the Department. An exemplified copy, however, has been filed in this court by defendants in error, and is printed as "Appendix No. 1" to this brief.

From the exemplified copy of this decision of Secretary Vilas it appears:

(*aa*) That in Hyde's application to contest the Sioux Half-Breed location, in addition to alleging illegality in such location, he affirmatively asserted his own claim thereto as a pre-emptor; that he was a single man over twenty-one years of age, and had declared his intention to become a citizen; that he did not own 320 acres of land in any State or Territory; that he had not left land of his own in said State to settle on public lands; that he had never theretofore exercised the pre-emption right; that he had settled upon this land on the 20th day of August, 1884, for his own use and benefit, and that he intended to file his declaratory statement therefor as soon as the plat of survey was filed.

(*bb*) That the application prayed the allowance of a contest in consideration of the above allegations.

(*cc*) That at the hearing of the contest before the Register and Receiver, as appeared from the record, all parties to the case assumed that the rights of Hyde and McDonald were involved, and that voluminous testimony was taken on that question.

(*dd*) That the Register and Receiver, in their decision, so treated the case, but in view of their finding in favor of the scrip locations, did not consider it necessary to pass upon the question of the *bona fide* character of the pre-emption claims.

(*ee*) That the Commissioner, upon this appeal, reversed the decision of the Register and Receiver, without allusion to the matter of the pre-emption claims.

(*ff*) That the appeal of Hyde from the decision of the Register and Receiver, rejecting his application, was transmitted to the Secretary, with the appeal by Eaton, and was before him with the record.

(*gg*) That before the Secretary, upon appeal, the question whether the pre-emption claim of Hyde was then pending on the record before him, was directly raised in argument and fully considered.

(*hh*) That the Secretary, after full consideration, held that the pre-emption claim of Hyde was directly put in issue and tried; that, under the circumstances of the case, it was the duty of the Department to dispose of it; that

under the testimony Hyde had undoubtedly made a contract which would prevent his perfecting his claim; that the same should therefore be rejected, and, all other claims being also rejected, that such his decision left "the land in question open to disposal under the land laws of the United States applicable thereto."

(15) That Hyde filed a motion for review of the above-recited decision of Secretary Vilas, basing said motion upon the grounds that a mistake had been made in misquoting the testimony of Hyde, that his pre-emption claim was not in issue, and that the land should not have been held open to the first applicant, and that such motion was, upon the 28th day of January, 1891, overruled in all things by the then Secretary, Hon. John W. Noble, except that the said decision was modified so that the preference right of entry claimed by Hyde and McDonald was not decided thereby. (Tr., pp. 22, 23.) This decision is not shown by exhibit, but is found in 12 Land Decisions, page 157, *et seq.*, and the material portion thereof is printed as "Appendix No. 2" to this brief. By reference thereto it will be seen:

(*aa*) That Secretary Noble carefully reconsidered the entire decision of his predecessor and reaffirmed the same in all things except to modify it so as to exclude the presumption that it denied, in advance of presentation, any claim which Hyde might present to a preference right of entry under the act of May 14, 1880 (21 Stat., 140, Sec. 2).

(*bb*) That the Secretary specifically held, affirming his predecessor, that the record brought up the pre-emption claim of Hyde for review and that the Department had full jurisdiction to decide it.

(*cc*) That the Secretary held that the misquotation of the testimony of Hyde was entirely immaterial; that the change did not destroy the effect of the testimony as a whole or require a different conclusion; that there was testimony to sustain the finding of his predecessor; that it was not shown

that such finding was against the preponderance of the evidence and that review would not, therefore, be allowed.

(*dd*) That upon this motion there were filed *ex-parte* affidavits of Hyde, McDonald and White, upon the question of the contract; that the Secretary gave such affidavits consideration and held that they did not destroy the force of the previous testimony, or call for any further action on the claims; that their use was apparently an effort to take the particular tract in controversy in the case at bar "out of the contract mentioned and clear it of the taint attaching to the claim," and that this was impossible because a contract to convey any part rendered the whole claim invalid.

(*ee*) That the Secretary held that any question as to Hyde's preference right of entry, under the act of 1880, could only arise after cancellation of the scrip location and notice thereof and ought not to be decided prior to that time; that such question was not expressly decided by Secretary Vilas, but, to prevent such an inference, his decision would be modified by saying that the question was not decided.

(b) *Contest after restoration of lands to public appropriation.*

December 21, 1894, the then Secretary of the Interior, Hon. Hoke Smith, rendered a decision in another proceeding, entitled McDonald *et al. v.* Hartmann *et al.*, to which Hyde was a party, involving all of the tracts formerly covered by the Sioux Half-Breed locations. This proceeding and decision, which are not referred to in any way in the cross-petition, were the natural sequence of the Hyde and McDonald contest against the Sioux Half-Breed scrip. From Secretary Smith's decision, found in 19 L. D., page 547 *et seq.*, and the material portion of which is printed as "Appendix No. 4" of this brief, the following appears:

(*aa*) That pursuant to the decision of Secretary Vilas of February 18, 1889, cancelling the Sioux Half-Breed loca-

tions, the lands covered thereby were, upon the 23d day of February, 1889, opened to receipt of applications and filings at the District Land Office; that immediately upon the opening of the said office on the morning of that day, various conflicting applications to enter, locate and file were tendered by various parties; that these conflicts resulted in a hearing being ordered to determine the claims of the respective applicants; that at this hearing a vast amount of testimony was taken and that this decision of December 21, 1894, was the judgment of the Secretary of the Interior upon said case.

(*bb*) That under and in pursuance of the decision of Secretary Noble, dated January 28, 1891, hereinbefore noted, reserving for future disposition the claimed preference right of Hyde, the latter became and was a party to this succeeding case now under notice; that he was recognized as such by the order for a hearing; that he became formally a party, under a distinctive claim, by filing, upon the 2d day of April, 1891, a homestead application, alleging settlement August 20, 1884; that he appeared at the trial and produced a large amount of testimony relating to his settlement, residence, and cultivation; that he appealed from the adverse decision of the Register and Receiver; that he also appealed from the decision of the Commissioner affirming that of the local officers, and that while the case was before the Secretary he was represented by counsel, who elaborately presented his case.

(*cc*) That the Secretary in disposing of the case treats the claim of Hyde as arising in two ways: first, under his pre-emption claim; second, as a preferred claimant under the act of May 14, 1880, by virtue of his contest against the Sioux Half-Breed location. He disposes of the pre-emption claim, in terse and forcible language, by holding that all questions relating thereto are *res adjudicata* under the decisions of his predecessors; and as to the claim of preference right under the act of 1880, he rejects the same, holding that the proceedings in the prior contest were not, either by intendment or in form, a contest under said act; that there was no intimation even in such proceedings that the contest was so intended; that the papers bear no resemblance

whatever to the familiar affidavits used under that act; that during the progress of the original contest proceedings, Hyde, by his attorneys, declared that such was not the character of the contest and refused to pay the land-office fees required of contestants by the act; that this claim was evidently an afterthought which came to Hyde when casting about for some means to extricate himself from the wreck in which the decision of February 18, 1889, involved him, and that there was no theory of the case under which he could be called a contestant under said act.

April 12, 1895, the foregoing recited decision by Secretary Smith was, upon motion for review, reaffirmed by the same officer. This action is noted in 20 Land Decisions, page 324.

The decision of the Commissioner of the General Land Office, in the case, which was affirmed in all things so far as the above-enumerated points are concerned, is shown by exemplified copy filed by defendants in error, and the material portion thereof is printed as "Appendix No. 3" to this brief. From this decision the following additional facts appear:

(*dd*) That upon the trial of the case before the local officers "voluminous testimony" was introduced on the question of the existence of the prohibited contract.

(*ee*) That in his decision the Commissioner found that this testimony clearly and conclusively established the fact of the existence of such a contract, even if such fact did not conclusively appear in the prior case.

(*c*) *Hyde's application to contest Warren location.*

(1) That, October 15, 1885 (two months after Hyde's rejected application to file pre-emption declaratory statement and his appeal from such decision had been transmitted to the General Land Office and while the record at

the local office was clear), Joseph H. Sharp, as attorney in fact for James H. Warren, a beneficiary under the 7th clause of the 2d section of the Treaty of September 30, 1854 (10 Stat. 1109), located, in the name of said Warren, the particular forty-acre tract here in controversy, with a certificate of identity issued to him under said treaty. The cross petition avers that the said certificate was issued without authority and unlawfully, and, upon information and belief, that Sharp was not the attorney in fact for Warren, but an agent of parties to whom Warren had sold the same and who had knowledge of defendant's rights at the time of such location. (Tr., pp. 15, 16.)

(2) That, April 10, 1886 (four days after the trial of the Sioux Half-Breed contest at the local office, as hereinbefore recited), Hyde filed in the local land office an application to contest the above-mentioned location, upon the ground of his (Hyde's) prior pre-emption claim, and accompanied said application with a motion to cancel the said Warren location. (Tr., p. 16.) What immediately became of this application is not averred, but presumptively it was forwarded to the General Land Office in due course of business.

(3) That, December 22, 1888, the Commissioner of the General Land Office, upon this application, ordered a hearing before the local land officers to determine the superior right between Hyde and Warren. No copy of this order is filed with the cross-petition. (Tr., p. 16.)

(4) That, March 8, 1889, eighteen days after Secretary Vilas' decision declaring Hyde's claim invalid, and in pursuance thereof, but without notice to Hyde, the Commissioner revoked the order of December 22, 1888 (*supra*), directing a hearing upon Hyde's application to contest the Warren location. (Tr., p. 22.)

(5) That, about July 6, 1889, Hyde moved the Commis-

sioner to set aside the order of March 8, 1889, upon which motion no action has ever been taken. (Tr., p. 22.)

(d) *The Hartmann contest versus Warren.*

(1) That, March 19, 1889 (the claim of Hyde having been then rejected by Secretary Vilas' decision of February 18, 1889, and the order of the Commissioner for a hearing upon Hyde's application to contest the Warren location having been, March 8, 1889, consequently revoked), one Emil Hartmann filed an application to contest the Warren location, which was refused by the local officers, as were also certain applications by other persons to enter and contest said lands offered at about the same date. (Tr., p. 22.)

(2) That, October 16, 1889, these applications having reached the General Land Office upon appeal, the Commissioner affirmed the action of the Register and Receiver, but did not pass upon the motion of Hyde to reinstate his contest against the Warren location, and that from this decision of the Commissioner all parties to the case, including Hyde, except Warren, appealed to the Secretary of the Interior. (Tr., p. 22.)

(3) That, May 31, 1892, the Secretary of the Interior (Hon. John W. Noble), upon consideration of these appeals, rendered a decision, based upon the prior decision of Secretary Vilas of February 18, 1889, erroneously and contrary to law deciding that Hyde could claim nothing by virtue of his pre emption claim, and ordering a hearing upon Hartmann's contest. (Tr., pp. 22, 23.) No copy of this decision of Secretary Noble accompanies the cross-petition, but it will be found in 14 Land Decisions, pages 576 *et seq.*, and the material portion thereof is printed as "Appendix No. 5" to this brief.

From this decision of the Secretary it appears that the following was decided:

(*aa*) That Hyde was not a contestant under his application of April 10, 1886, the only one prior to the others then pending, because it was based upon his pre-emption claim which was declared invalid by the two preceding decisions; and also because his motion to set aside the order revoking the hearing was not filed until July 6, 1889, subsequent to the other applications to contest.

(*bb*) That, although he had made certain other recited applications or tendered filings, he had no perfected application to contest until long after those of the other parties to the case then pending, and that his rights as a contestant were subject to such prior applications.

(4) That, November 12, 1892, upon motion for review filed by Hyde, Secretary Noble reaffirmed his prior decision of May 31, 1892 (*supra*), and denied said motion. (Tr., p. 23.) No copy of this decision accompanies the cross-petition. It will be found in 15 Land Decisions, pages 415 *et seq.*, and the material portion thereof is printed as "Appendix No. 6" to this brief.

In this decision, as affecting Hyde, the Secretary holds and decides:

(*aa*) That there was no error in rejecting Hyde's pre-emption claim by reference to the preceding decisions denying its validity.

(*bb*) That Hyde's rights as a contestant were not definitely disposed of by the decision sought to be reviewed, but simply postponed until the prior contests were decided.

(5) That, under the above-mentioned decisions, a hearing upon the Hartmann contest against Warren was had; that when said case was called before the local officers, Hyde appeared and demanded to be made a party thereto and to be allowed to offer evidence in support of his *pre-emption*

claim; that these demands were refused by the local officers; that defendant appealed to the Commissioner; that said last-mentioned officer affirmed the decision below; that Hyde appealed to the Department, and that upon the hearing of this last appeal the Secretary (Hon. Hoke Smith), July 20, 1894, affirmed the decision of the Commissioner. (Tr., pp. 23, 24.) No copy of this decision accompanies the cross-petition. It is reported in 19 L. D., pages 64 *et seq.*, and the material portion thereof is printed as "Appendix No. 7" to this brief.

This decision, reaffirming the prior decision of Secretary Smith, on review, in Hyde *v.* Warren, 15 L. D., 415, and quoting therefrom, again decides that all questions under Hyde's pre-emption claim are *res adjudicata.* His claim as a contestant under the act of 1880 was not even raised by Hyde upon the hearing nor is it mentioned in the decision. As will be recollected, that claim was subsequently, December 21, 1894, by the same Secretary (Mr. Smith), fully considered and decided in the case of McDonald *et al. v.* Hartmann *et al.*, 19 L. D., 547, hereinbefore particularly recited, in which Hyde was a party and directly raised that particular point.

The foregoing statement enumerates, in substance, all the facts relied upon by plaintiff in error as constituting an equitable defense, both as pleaded and as shown by the official decisions of the Commissioner and Secretary. Our excuse and apology for reciting the same with such detail and particularity is the apparent impracticability otherwise of conveniently possessing the entire case as it exists.

Prior to the discussion of the question here immediately under consideration, certain preliminary consideration are pertinent.

First.

This court will take judicial notice of the several orders and decisions of the Secretary of the Interior and Commissioner of the General Land Office referred to in the cross-petition or made by either of those officials as part of the proceedings upon which the equitable defense is based and of all facts found by said decisions not contrary to the findings of fact in the case at bar. And in ascertaining facts of which the court will thus take judicial notice, it will be informed from such sources as it deems most reliable, including the official printed reports of such decisions or exemplified copies thereof filed with the transcript.

The general doctrine upon which the foregoing proposition rests is a familiar one and is clearly applicable to the case at bar, where it is invoked in respect to records of public officers, acting within their jurisdiction upon the same subject-matter, and where the identical papers, with one exception, are referrd to in, and thus made part of, a pleading before the court.

Judicial notice will be taken of the recognition or denial of the sovereignty of a foreign power, as the same appears by the acts of that part of the executive branch of the government dealing with foreign affairs, although such acts are not formally put in evidence, nor even in accord with the pleadings.

Jones *v.* United States, 137 U. S., 202, 214.

The same doctrine has also been applied to the general amnesty proclamation of the President of December 25, 1868.

Armstrong *v.* United States, 13 Wall., 154.

Jenkins *v.* Collard, 145 U. S., 546, 560, 561.

And also to the archives of the former Mexican government of California affecting land titles.

United States *v.* Teschmaker, 22 How., 392, 405.
Romero *v.* United States, 1 Wall., 721, 742.

And in respect to the records of the Department of the Interior, as that branch of the executive power having jurisdiction over the disposal of public lands, this court has repeatedly held that they were within the class of public records of which the court would take judicial notice.

Caha *v.* United States, 152 U. S., 211, 221, 222.
Heath *v.* Wallace, 138 U. S., 573, 583, 584.
Knight *v.* U. S. Land Assn., 142 U. S., 161, 168, 169.
Johnson *v.* Drew, 171 U. S., 93, 99.

Caha *v.* United States (152 U. S. 211, *supra*) was an indictment for perjury, reaching this court in error from the District Court of the United States for the district of Kansas. The false swearing was alleged to have occurred in a certain contest respecting a tract of public land, before the Register and Receiver of the United States Land Office at Kingfisher, Oklahoma, wherein the defendant was a party. The rules and regulations prescribed by the Interior Department in respect to contests before local land offices were relied upon to sustain the conviction, although such rules and regulations had not been introduced in evidence. The question directly arose whether, in a criminal proceeding, the court could take judicial knowledge of these records of the Interior Department, and in disposing of that question, the court, speaking by Mr. Justice Brewer, said (pages 221, 222):

"The rules and regulations prescribed by the Interior Department in respect to contests before the Land Office were not formally offered in evidence, and it is claimed

that this omission is fatal, and that a verdict should have been instructed for the defendant. But we are of opinion that there was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which the courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by the express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

Heath *v.* Wallace (138 U. S. 578, *supra*) was an action of ejectment brought to this court by writ of error to the Supreme Court of the State of California. The plaintiff below, and in error, claimed title under the swamp-land grant of September 28, 1850, as confirmed, in that State, by the special act of July 23, 1866 (14 Stat. 218, 219; R. S., sec. 2488). The defendant claimed under a patent issued upon a pre-emption claim. The special act of 1866 confirmed all lands designated upon approved township plats as "swamp and overflowed." The findings of fact showed that upon an official approved survey of the township, a certain portion thereof, embracing the particular tract in question, was colored blue and designated "land subject to periodical overflow." One of the questions presented was whether lands thus designated as "subject to periodical overflow" were within the descriptive terms of the confirmatory act as "swamp and overflowed." This court, affirming the judgment of the court below, held that lands so designated were not within the confirmation, and, in thus disposing of the case, took judicial notice of facts shown

by a decision of the Secretary of the Interior, affecting the same general body of lands but forming no part of the record in the case before the court. In this connection, Mr. Justice Lamar, in delivering the opinion of the court, referred to the decision of the Secretary mentioned, by reference to the report thereof in the Land Decisions; recited that in such decision the Secretary found that upon said plat were certain other and additional notations, showing the construction given the disputed words by the Department, and then added (page 584):

"We think we may take judicial notice of such official statements made by the head of one of the branches of the Executive Department, especially as they relate to the public records under his control. (1 Greenleaf on Ev. § 479; Jones *v.* United States, 137 U. S. 202, and authorities there cited.)"

The case of Knight *v.* The U. S. Land Association (142 U. S. 161, *supra*) was an action of ejectment brought to this court by writ of error to the Supreme Court of the State of California and involved title to tide lands at the water front of the city of San Francisco. The judgment of the Supreme Court of the State was reversed in conformity with two elaborate and exhaustive opinions, one on behalf of the entire court, by Mr. Justice Lamar, and one, additional thereto, and concurring, by Mr. Justice Field. Both of these opinions refer to and take judicial notice of many facts connected with the title of the Pueblo of San Francisco, not shown in the record but recited in various records of the Department of the Interior. And in explanation of, and as authority for, so proceeding, the statement of the case, prepared by the learned justice who delivered the opinion of the court, thus proceeds (pages 168, 169):

"To understand precisely the exact nature of the questions involved in this case, a somewhat more detailed statement of facts than is contained in the above findings of the referee will be found useful. These facts are not contradictory of those findings and are recited in former decisions of this court, statutes of the United States, and of the State of California, and the records of the Interior Department, of all of which the court can take judicial notice."

Johnson *v.* Drew (171 U. S. 92, *supra*) was an action in ejectment coming to this court in error to the Supreme Court of the State of Florida, and the main question involved was whether the premises in controversy were within the limits of a military reservation at the time a patent was issued. In disposing of the case, the court, after referring to the testimony as it appeared in the record, thereupon considered, as properly bearing on the subject, a part of the records of the General Land Office. Mr. Justice Brewer, in delivering the opinion of the court upon this point, said (p. 99):

"Further and finally, the plat on file in the General Land Office, and a part of the public records, puts the question at rest, and locates the land outside the reservation. Hence, as shown by the testimony and by the public records, this land ever since 1870 has been part of the public lands of the United States and subject to disposal in accordance with the general land laws."

The last four above recited cases are directly in point, and must, we think, be taken as conclusive of the question now under consideration. In the first, the doctrine was applied to the set of rules and regulations governing practice before the local land office, not precisely the case at bar, but fairly illustrating the principle and properly controlling the question in the case. The last three cited cases are precisely that at bar, except that in the pending case there is

the additional consideration that the records relied upon are actually made part of the pleadings by specific reference.

Upon the question of the method or the medium by which it may become possessed of the facts of which it will take judicial notice, the court has been equally explicit.

In Jones *v.* United States (137 U. S. 202, *supra*), speaking to this point, the court, by Mr. Justice Gray (p. 216), said:

"In the ascertainment of any facts of which they are bound to take judicial notice, as in the decision of matters of law which it is their office to know, the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy. * * * As to international affairs, such as the recognition of a foreign government or of the diplomatic character of a person claiming to be its representative, they may inquire of the foreign office or the Department of State."

It will be observed that in the assignment of errors filed in this court, and in the brief of counsel thereon, it is claimed that the allegations of the cross-petition are "admitted to be true by the reply of the Bishop Iron Company." (Tr., p. 4.) And in brief of counsel, at page 2, it is asserted that after the record was transmitted from the Supreme Court to the trial court, after the first hearing, the Bishop Iron Company "withdrew its demurrer and interposed a reply in which it admitted all the facts set forth in the counter-claim to be true." The situation, as it seems thus to be understood by counsel, is not the real situation of the pleadings, either in fact or law. The case first went to the Supreme Court of the State upon a demurrer of the Bishop Iron Company, and a demurrer of certain of the other defendants in error, interposed solely and only to the second subdivision of the defendant's answer, which subdivision was the equitable defense as contra-distinguished

from the formal answer to the declaration in ejectment. (Tr., p. 32.)

When the case was in the Supreme Court of the State, for its first hearing, that court had before it no question except those raised by the demurrers directed only to the cross-petition or equitable defense. No question raised by the answer of the defendant to the formal declaration in ejectment had at that time been heard by the lower court. After the order of the Supreme Court of the State, sustaining the demurrer to the cross-petition, and after the mandate had taken the case back to the trial court, the Bishop Iron Company filed a replication, or reply, specifically limited to that portion of the defendant's answer not previously demurred to, to wit, to that portion which answered, partly by traverse and partly by confession, the formal declaration in ejectment. (Tr., p. 34.) This is all which the record, in any way, shows upon this subject. And from this it will be seen that the Bishop Iron Company did not, either in fact or legal effect, at any time, withdraw its demurrer to the cross-complaint; and, further, that the reply or replication did not admit anything except such facts as were specifically alleged in the complainant's complaint.

If it is intended to say that the allegations of the cross-complaint are admitted for the purposes of the demurrer, provided such demurrer be properly before this court under the writ of error, then we have no contention with the proposition. That would undoubtedly be the effect of the pleadings. But the facts of the cross-petition would, in that event, be admitted only for the purposes of the hearing upon the demurrer and in no other respect. And that admission would in no way affect the right and duty of the court to take judicial notice of the public records of the General Land Office and the Department of the Interior under the doctrine which we are now discussing.

We submit, in view of the above authorities, that the court in the case at bar should take judicial notice of the records and files of the Land Department appertaining to the case, at least so far as the same are specifically referred to in the cross-petition, and that the facts can be ascertained by an inspection of the decisions in question in the official publication known as "Decisions of the Department of the Interior relating to Public Lands," or from exemplified copies of such decisions filed in the cause.

Second.

An equitable defense may, under the practice act of Minnesota, be pleaded in an action of ejectment; but to prevail over the legal title, the equities upon which such a defense is based must be strong, clear, and decisive. They must be such as, under general practice, would sustain a bill in equity to enjoin the owner of the legal title from proceeding at law. In other words, only such a case can be thus successfully pleaded as would sustain a bill in equity for affirmative relief.

Genl. Statutes of Minn. (Wenzell, 1894), sec. 5236.
McClane *v.* White, 5 Minn. 178 (Gil. 139).
Williams *v.* Murphy, 21 *ib.* 534.

In McClane *v.* White (*supra*), the Supreme Court of the State, speaking directly to this point, said (Gil., p. 150):

"The complaint states, and the answer admits, a good legal title in the plaintiff. Whatever defense the defendant has to the action is entirely of an equitable character. Under the old system of pleadings an equitable defense could not be interposed in an action of ejectment, but under the code this may be done. But to prevail over the legal title, in the absence of any fraud or mistake, or unfair dealing, in the person holding the same, the equities on the

part of the defendant must be shown to be strong, clear, and decisive, and such as would entitle him to a conveyance on a bill filed for that purpose."

And precisely the same rule applies in many, if not all, the States where similar statutes exist, as will be seen by reference to the following cases, selected from among many others, announcing the doctrine:

Wicks *v.* Smith, 18 Kans. 508.
Walton Plow Co. *v.* Campbell, 35 Neb. 175.
Bruck *v.* Tucker, 42 Cal. 352.
Halliday *v.* Strickland, 60 Ga. 151.
Ells *v.* Pac. R.R. Co., 51 Mo. 204.
Ming *v.* Foote, 9 Mont. 222.
Kohn *v.* Old Tel. Min. Co., 2 Utah, 174.

Third.

We submit that the case at the outset might be disposed of upon one single consideration. The plaintiff in error, Hyde, rests his entire case upon the claim that the Land Department improperly found that he had executed an illegal and prohibited contract. This claim he affirmatively pleads by way of equitable defense. Yet his answer does not in any way or manner deny the fact that he executed such a contract and that it is now in existence. The entire equitable defense, when reduced to its essential elements, is simply a claim that the Secretary was not justified, upon the evidence before him, in finding the fact of such a contract.

We submit that the plaintiff in error, so far as the equitable defense is concerned, stands in the position of a defendant in equity, bound under the law to answer fully and to disclose all of the facts within his knowledge. Still further, he is, as to this equitable defense, in the position of a plaintiff in equity, bound to display a pleading

entitling him to affirmative relief. Thus standing he attacks a patent of the United States upon the ground that the Land Department improperly found that he had violated the law and, in substance, had undertaken to swear falsely in his final proof. Yet he does not deny the fact thus found and rests his whole case upon the charge that the record before the Department did not justify that finding. His failure to specifically aver that he had made no such contract is, we submit, fatal to his claim, and the court should, upon that ground alone, affirm the judgment of the court below.

Fourth.

This brings us to the direct question whether the facts appearing by the allegations of the cross-bill, taken in connection with the documents of which the court will take judicial notice, establish a good equitable defence.

The assignments in this court by the plaintiff in error, while large in number, are limited to this one phase of the case, and a like position is also taken by counsel in their brief, where they say (pp. 6, 7):

"The controlling question in the case is whether or not the facts set forth in the answer by Hyde by way of counter-claim constitute a cause of action. * * * Unless Hyde, by virtue of the proceedings taken by him before the Land Department as set forth in his answer, is the equitable owner of the land and entitled to compel a conveyance thereof from those holding the legal title, the plaintiff in the trial court should have recovered."

In support of their contention that the facts set out in the cross-petition make the plaintiff in error the equitable owner of the land and entitle him to compel a conveyance

from the defendants in error, counsel submit, substantially, the following claims:

(*a*) That the order of the Commissioner of the General Land Office, dated March 8, 1889, dismissing Hyde's application to contest the Warren location, filed April 10, 1886, was *ex parte* and therefore is not binding upon the court.

(*b*) That Secretary Vilas had no jurisdiction to render his decision of February 18, 1889, declaring the pre-emption claim of Hyde invalid, because no issue raising that question was involved in the case before him.

(*c*) That the testimony referred to in the decision of Secretary Vilas was only admissible for the special purpose of determining the validity of the scrip location.

(*d*) That this testimony, properly considered, showed nothing more than a mortgage of the premises and that the contract was therefore not obnoxious to law.

(*e*) That, in cases where injustice has been done by a decision of the Department, this court can review the *questions of fact involved.*

Without following in detail, in the order stated, either the assignments of error or the above-enumerated points of the brief, we submit, in answer to all that is therein contained, the proposition that the judgment below, sustaining the demurrers, must be here affirmed because:

1. The finding of the Land Department to the effect that Hyde had entered into a contract by which the title which he would acquire from the Government might enure in part to others than himself was a decision of fact, and as such is final and conclusive upon the courts.

2. That, even if this be otherwise, upon the case as presented to the Land Department the testimony affirmatively showed the existence of a prohibited contract; the Department properly so held, and this court must, upon that ground, affirm the decision of the court below.

1.

Departmental Decision Final.

The exact claim of right under which the plaintiff in error is supposed to have an equitable title is not clearly apparent either from the assignments of error or the brief of counsel. It is referred to at times as a "pre-emption" claim having relation to the date of an alleged settlement made in 1884. At other times it is spoken of as a "preference" right to enter the land. There seems to be confusion in the use of the two terms above mentioned. This peculiarity not only appears in the case at bar, but, as will be observed, runs through all of the cases heard and decided by the Department so far as the presentation of Hyde's claim is concerned. There is no confusion in the Departmental decisions themselves on the subject, but the manner and form in which, under different circumstances, Hyde's claim has been asserted varies apparently according to the exigencies of the occasion. While this peculiarity is not at all material in the view of the case which we take, a reference to the distinction between the two classes of claims, in land jurisprudence, may not be here inappropriate.

In the practice of the Land Department, as it has existed since May 14, 1880, there are two distinct and separate classes of "contests" which can be initiated and which may result in the contestant obtaining title. The first and more ancient of the two classes is that where two different rights or claims in two different individuals are asserted against each other, each being founded upon some prior act or acts connecting the claimant with the paramount source of title. In the second or later class, the contests arise under Section 2 of the act of May 14, 1880 (21 Stat. 140), which

provides that in all cases where a person has contested an entry, paid the land-office fees, and procured the cancellation of the entry so contested, he shall be allowed thirty days from notice of such cancellation within which to enter the premises, as a preferred claimant.

In the first of the above-enumerated classes the contestant wins, if he succeeds at all, by affirmatively establishing some paramount right, claim, or title in himself as against that which is claimed by the contestee; and to this class of cases the act of May 14, 1880, has no application.

In the latter class of cases the contestant does not set up any right, title, or claim in himself, but standing practically in the relation of an informer who is to be rewarded in case of success, obtains, after cancellation, a preferred right to take the lands, title to which he may procure, at his election, under any statute of the United States disposing of the public domain.

In the first class he succeeds because of the superiority of a claim (by reason of seniority or on account of defect in the adversary claim) which he affirmatively sets up; in the latter class he sets up no claim at all, and is simply rewarded as a successful informer against a fraudulent or illegal claim.

The distinction between these two classes of contests is elementary; the difference in the form of procedure is distinctive and characteristic, all of which appears by decisions of the Department too numerous to mention.

As we proceed with an examination of the decisions of the Land Department adverse to Hyde, affecting his claim to the premises involved in the case at bar, it will be observed that these decisions not only dispose of the claim of Hyde as an entirety, but also specifically determine it as falling within each of the two classes above enumerated and reject it as not properly falling within either.

There have been seven decisions by three different Secretaries of the Interior, by each of which the claim of Hyde has been held illegal and invalid. Each of these decisions rejected such claim. And, in pursuance of these repeated adjudications, patent finally issued to Warren, under which the defendants in error now claim. These seven decisions are:

Secy. Vilas, Feb. 18, 1889; Appendix No. 1.

Secy. Noble, Jany. 28, 1891; 12 L. D., 157; App. No. 2.

Secy. Noble, May 31, 1892; 14 L. D. 576; App. No. 5.

Secy. Noble, Nov. 12, 1892; 15 L. D., 415; App. No. 6.

Secy. Smith, July 20, 1894; 19 L. D., 64; App. No. 7.

Secy. Smith, Dec. 21, 1894; 19 L. D., 547; App. No. 4.

Secy. Smith, Apr. 12, 1895; 20 L. D., 324.

To the proceedings in all of the cases in which these decisions were rendered, Hyde was a party. By all seven of said decisions, his pre-emption claim, based upon his alleged settlement in 1884, was declared illegal and invalid; in two of the cases upon full consideration of evidence taken, and in the other five because the questions involved were determined to be *res adjudicata*. Still further, by two of such decisions his claim, treated as one of preference right under the act of May 14, 1880, was rejected as absolutely untenable, after a full and careful hearing.

If, under such circumstances, the action of the Interior Department is not conclusive in the courts upon the claim thus adjudicated, it is hard to imagine a case where that result will obtain. If seven decisions, by three different

Secretaries of the Interior, do not settle a question of this kind, when recourse is afterwards had to the courts, that result must certainly be because some positive and flagrant error is shown to have been committed by the officers of the Land Department.

As hereinbefore stated, the decisions in question arose in connection with what may be termed three separate and distinct proceedings, although two of such proceedings are so connected, in respect to Hyde, as to follow one after the other in natural sequence and continuation. The first of these controversies was that culminating in the decision of Secretary Noble of January 28, 1891, Appendix No. 2. That was the proceeding which was initiated by the contest of Hyde brought against the original Sioux Half-Breed scrip location. The land being then unsurveyed, but covered by the unadjusted location of the Sioux Half-Breed scrip, Hyde made settlement upon the same, filed an application to contest the scrip location and offered to file as a pre-emptor. This resulted in a hearing being ordered; in a trial being had; in a large amount of testimony being taken, affecting both the scrip location and the pre-emption claim of Hyde, and ultimately in a decision by Secretary Vilas,—that of February 18, 1889. In this decision, after reciting in full all the proceedings by which the claim reached him for consideration, and after quoting certain portions of the testimony relating to Hyde's pre-emption claim, the Secretary said:

"Further evidence than that above quoted from the testimony of Hyde and McDonald is unnecessary to show that they have, by contracts which they admit having made, disqualified themselves from taking the land under the pre-emption law.

* * * * * * *

"The testimony of the two claimants establishes beyond question that the statements made in their applications to contest, that their settlements were made wholly for their own use and benefit, were not well founded, and that it would be impossible for either of them to make the affidavit required by section 2262, R. S. U. S., 'that he has not directly or indirectly made any agreement or contract, in any way or manner, with any person whatever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself.'

"In view of this record and proof, it appears to be the duty of the Department to dispose of these claims of pre-emption. A hearing has been had upon the validity of them, in which the evidence was adduced fully, and upon which the material facts appear to have been sufficiently elicited to leave no doubt. Whatever rights they might have established would, under a familiar rule of the Department, have been regarded as fixed at the time when they made their application to file. Their applications to file must be treated as if they had been allowed, subject to the rights of others; and it now appears that they ought to be canceled, if filed. Their appeal (which is sent up in the record) from the rejection of their applications appears to bring the whole matter before the Department; and in the exercise of the power of supervision vested in the Department by law, it seems to be demanded that upon this disclosure of the facts the proper action should be taken. If there had been no hearing upon this question the proper action would be, upon a suggestion of such information, to direct a hearing to be had; but inasmuch as a hearing has been had, and as the testimony which shows the absolute impossibility of perfecting a pre-emption title in these claimants has proceeded from themselves, testifying under oath, there appears no reason for directing a further hearing.

"If their declaratory statements were now to be filed as of that date, the duty would rest on the Department to cancel them, in accordance with the ordinary practice in such cases."

After the rendition of this decision by Secretary Vilas, both Eaton, the Sioux Half-Breed claimant, and Hyde filed motions for review. The date of the filing of these motions does not appear, but as Secretary Vilas retired from office March 4, 1889, and was succeeded by Secretary Noble within thirty days after the date of Secretary Vilas' decision, and as thirty days from notice of decision are allowed for filing motions for review (Rule of Practice No. 77), it is evident that such motions were not filed in time for disposition by Secretary Vilas before his retirement from office. They thus went over for action by Secretary Noble, who, after elaborate consideration, and even after admitting *ex-parte* affidavits filed on behalf of Hyde, reaffirmed the decision of his predecessor so far as it held the claim of Hyde to be in violation of law and invalid. In this decision Secretary Noble, disposing of this question, after reciting the various steps in the proceedings by which the case reached the Department, after trial at the local office, said (12 L. D., 159 *et seq.*):

"At this hearing testimony was submitted for and against, not only the scrip locations, but also the claims of these pre-emption applicants. The local officers found in favor of the validity of the scrip locations, and, in view of that fact, declared it unnecessary to conside 'the *bona fides* of Hyde and McDonald or their rights under the pre-emption law.'

"The decision rendered in your office made no disposition of the applications of Hyde and McDonald. The applications of these parties to file pre-emption declaratory statements came up with the record in the case and it was entirely competent for this Department, in the exercise of the jurisdiction conferred upon the head of it, to consider and determine all questions presented by the record."

And, after referring to the alleged misquotation and misapprehension of Hyde's testimony, the Secretary added (p. 160):

"This change does not, however, destroy the effect of the testimony taken as a whole, or necessarily demand a different conclusion. There is testimony to sustain the finding on this particular phase of this case, and it is not shown that such finding was against the palpable preponderance of the evidence. In such cases a review will not be allowed."

And then, further proceeding to a discussion of the affidavits filed on this question in support of the motion, the Secretary added:

"This is apparently an effort to take the tract described out of the contract mentioned and to clear it of the taint attaching to the claim. A contract made before entry to convey any part of the land filed for renders invalid the whole claim. The statements made in these affidavits do not, in my opinion, destroy the force of the testimony given at the hearing or call for further action in these claims."

It is thus seen that in this first proceeding the preemption claim of Hyde, upon testimony taken in a hearing which he himself procured and testimony which he himself and his witnesses furnished, was rejected because both Secretary Vilas and Secretary Noble found that he had made a contract under and by the terms of which the title which he might procure would enure to others than himself, and that his claim was therefore in violation of law and should be rejected, and, so far as any record had been made of the same, canceled.

The second proceeding, to which Hyde was a party, and in which some of these decisions were made, was the contest initiated by Hartmann against the Warren Chippewa Half-Breed scrip location on the 19th day of March, 1889. On this last-mentioned date Hartmann filed a contest, being one strictly under the act of May 14, 1880, against the

Warren location, alleging various grounds of illegality therein. It will be borne in mind that at this date the pre-emption claim of Hyde had been rejected by Secretary Vilas as hereinbefore recited. Other parties besides Hartmann also applied to contest the Warren location. Hyde became a party to this proceeding, insisting therein that his pre-emption claim was valid, and also that he had a right to contest under an application filed previously, which will be hereinafter noticed. Upon this situation, a hearing was ordered by the Commissioner of the General Land Office upon the application of Hartmann to contest, the Commissioner holding that Hartmann had presented the first perfected application in that regard. From this decision an appeal was taken to the Secretary, Mr. Noble being then in office, and this last-mentioned officer affirmed the decision of the Commissioner and held that Hartmann had presented the first application, with a *prima facie* case against Warren and was entitled to a contest under said act of 1880. In this decision, Secretary Noble, speaking to the question of the rights of these parties to contest the Warren location, said (14 L. D., p. 588):

"From his own showing, the contest application of Hyde, corroborated by the affidavits of Powers and McDonald, was not filed until October 29, 1889, long subsequently to the applications of Hartmann, Chandler and Barrick, and it appears that the hearing ordered upon his application of April 10, 1886, was revoked by you for the reason that the Department held, in Hyde *et al. v.* Eaton *et al.*, on February 18, 1889, and affirmed on review (12 L. D., 157), that Hyde's pre-emption claim for said tract was illegal."

Hyde filed a motion for review of this last-mentioned decision, assigning, among many other assignments, error in passing upon his rights as a pre-emption claimant. The Secretary, in denying this motion for review, by his decision

of November 12, 1892, and referring particularly to the pre-emption claim of Hyde, said (15 L. D., 416):

"The right of Hyde as a pre-emption claimant, under the settlement upon which he bases his claim to this land, was involved in the case of Hyde *et al. v.* Eaton *et al.*, decided February 18, 1889 (not reported) and again on motion for review on January 28, 1891 (12 L. D., 157). It was there found that this settlement was not made in good faith, for his own use and benefit, and that he therefore acquired no rights by virtue of that settlement. That decision disposed of his claim, not only as to the particular tracts of land involved in that case, but also as to all the tracts which he claimed under such settlement; that is, his claim as a whole was held to be invalid after a full investigation and opportunity to Hyde to be heard in defense thereof. This being the case, it was wholly unnecessary to again go over the same ground, when some other person not a party to the former proceedings presented a claim to part of the land. It was not error to dispose of Hyde's pre-emption claim, as was done in the decision complained of, by citing the former decision of the Department holding it invalid. His rights as a contestant were not definitely disposed of in the decision attacked by this motion, but consideration thereof was simply postponed until the prior contests could be decided."

Under these two last-mentioned decisions of Secretary Noble, the contest of Hartmann proceeded; Hyde appeared and demanded to be made a party thereto and to be allowed to offer evidence in support of his *pre-emption claim;* these demands were refused by the local officers; Hyde appealed to the Commissioner; that officer affirmed the decision of the Register and Receiver; Hyde appealed to the Department, and the then Secretary (Hon. Hoke Smith having succeeded Mr. Noble), by the decision of July 20, 1894, affirmed the decision of the Commissioner of the General Land Office. In this decision, Secretary Smith, refer-

ring to the position of Hyde in the case and to his demand to be recognized as a pre-emption claimant, said (19 L. D., 76):

"It appears that Thomas W. Hyde appeared at the hearing before the local officers, and sought to introduce testimony to establish a pre-emption claim to a part of the land in controversy, to wit, the N.E. ¼ of the S.W. ¼ of Sec. 30. The register and receiver declined to receive the testimony offered, or to admit Hyde as a party to the hearing, which was affirmed by the decision of your office under consideration. Hyde appeals to the Department.

"There must necessarily be somewhere a termination of all controversies. If there ever was a case before the Department to which the doctrine of *res adjudicata* is applicable it is the case of Mr. Hyde. He has had no less than four hearings before the Department, on appeal or on review, and he now presents himself for the fifth time with a persistence which is worthy of admiration."

The Secretary thereupon, referring to the case of Hyde *v.* Warren (15 L. D. 415), quotes what is therein said, being the language which we have above ourselves quoted, and then adds:

"There was therefore no error in the decision of your office in holding that the matter was *res adjudicata*."

The next and third proceeding to which Hyde was a party, and in which his claim was disposed of, was the one which grew out of the cancellation of the Sioux Half-Breed scrip location under Secretary Vilas' decision of February 18, 1889. This proceeding is not mentioned or referred to in the cross-petition, and light upon the subject is only available in consequence of the judicial notice which the court will take of the official records of the Department.

All its essential features will be found by reference to

We submit, that a defendant cannot thus, even under the practice of Minnesota allowing the combination of these legal and equitable defenses, proceed to the court of last resort in that State upon a demurrer, and when there defeated, return to the District Court for a trial of the other issues, and yet preserve for review in this court the questions raised upon the demurrer.

Respectfully submitted.

JAMES K. REDINGTON,
Attorney for Defendants in Error.

FRANK B. KELLOGG,
J. H. CHANDLER,
Of Counsel.

APPENDIX No. 1.

Decision of Secretary Vilas of February 18, 1889, *in Hyde and McDonald vs. Eaton et al.*

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *Feb.* 18, 1889.

Vol. 11–193.

HYDE & MCDONALD
v.
EATON & STRAM.
} Sioux Half-Breed Scrip.

The Commissioner of the General Land Office:

SIR: I have considered the case of Thomas W. Hyde and Angus McDonald *v.* Frank W. Eaton as attorney in fact for Orillie Stram *née* Moreau, on appeal by the latter from the decision of your office, dated August 4, 1888, holding for cancellation Sioux Half-Breed scrip, No. 19 D and 19 E, located and adjusted as follows:

Scrip No. 19 D upon lots 3, 5 and 6 and S.E. ¼ of N.W. ¼ Sec. 30, and that numbered 19 E upon lots 1 and 2 and S.W. ¼ of N.E. ¼ and N.W. ¼ of S.E. ¼. same section, Tp. 63 N., R. 11 W., Duluth, Minnesota.

It appears that Frank W. Eaton as attorney in fact for said Orilie Stram *née* Moreau, a Sioux Half-Breed Indian, filed in the Duluth, Minnesota, local land office, on June 16, 1883, the scrip above mentioned, and located the same on certain unsurveyed land, in amount three hundred and twenty acres, which locations were subsequently adjusted by the local office, and approved and posted by your office to embrace the tracts above described.

Said Half-Breed scrip bore date November 24, 1856, and had been issued under the provisions of the Act of July 17, 1854 (10 Stat. 304), to the Sioux Half-Breed named above.

July 20, 1885, Angus McDonald presented at the local office a pre-emption application for lot 2 and the N. ½ of S.E. ¼ and S.W. ¼ of N.E. ¼ of said section 30, which that office rejected, because the N.E. ¼ of S.E. ¼ was denominated swamp and overflowed land, and as to the residue of the tract, because the date of settlement as alleged in the application to file did not antedate the unadjusted scrip location No. 19 E, with which it conflicted.

On the same day (July 20, 1885) Thomas W. Hyde applied to make pre-emption filing for lots 5 and 6 and S.E. ¼ of N.W. ¼ and N.E. ¼ of S.W. ¼ of the same section (30), which application the local office rejected, for the reason that the alleged date of settlement did not antedate the unadjusted scrip location, No. 19 D.

November 14, 1885, a hearing was ordered by your office upon the application of McDonald and Hyde, who allege "that the scripee never made any improvements whatever upon said land, either in person or by an agent or attorney, and that said land, at the date of the attempted locations, was unsurveyed and belonged to the class of land only locatable with such scrip after the scripee shall have made improvements upon the same."

In support of the charges thus made was filed a copy of an affidavit (the original is now in the record) made October 9, 1884, by the scripee, in which she denied ever having given to said Frank W. Eaton, either directly or indirectly, a power of attorney, or any authority of any kind to locate said scrip, or to erect buildings and make improvements on the land in controversy, or upon any other land, for her use and benefit.

In refutation of the denial made as above by the scripee, Eaton filed copies of two powers of attorney given him by said scripee and her husband, May 25, 1883, conferring upon him the power and authority to locate said scrip, and to make the improvements which, under the act of 1854, were necessary before location could be made on unsurveyed lands; also, to do any other act necessary to be done in the premises, in order to secure a permanent and *bona fide* location, in the same manner as if done by them personally.

The case proceeded to hearing, which was held April 6, 1886.

* * * * * *

Upon a careful examination of the entire record, I find the facts to be substantially as stated by your office decision and outlined herein.

Epitomized, they are as follows:

The scripee disposed of her scrip, surrendering possession thereof to some one now unknown. Said scrip was accompanied by two powers of attorney, executed in blank, one giving authority to some one, not then named, to locate the scrip; the other giving a like authority to sell the land located upon. The scrip, after many years and after passing through several hands, lodged in the hands of Frank W. Eaton, who thereupon filled up the blanks in the power of attorney to locate, inserting his own name as that of attorney in fact for such purpose. He employed others to make slight improvements on the land in question (then unsurveyed) and after such improvements, which were scarcely deserving of the name, he located the scrip as attorney in fact for Orilie Stram, the scripee.

The blanks in the other power of attorney (that to sell) were filled up by inserting the name of Leonidas Merritt, who, it appears, was a business partner of said Frank W. Eaton, and said Merritt, as attorney in fact of the scripee,

executed certain warranty deeds transferring and passing title to the lands covered by the scrip locations to certain parties therein named, it appearing that said parties were Eaton, who had made the locations, and three men, Edward Byrne, James H. Powers and Joseph Clement, who had been by him, or through his agency, employed to make the improvements above mentioned.

Money consideration was expressed in said deeds, but it is apparent from the evidence that the real consideration, so far as Byrne, Powers and Clement were concerned, was what they had done in making the improvements. They got an undivided one-third interest. The residue went to Eaton.

The scripee never saw the land. At the date of the location she had never seen Eaton, who acted as her attorney in fact, and did not then know that there was such a person in existence. She had, as a matter of fact, sold the scrip long prior to the location, and had no personal interest in the land, nor were the improvements made for her personal use and benefit. It was a matter of no moment to her where the scrip was located, or whether it was located at all or not. Her actual interest in the matter ceased when she disposed of the scrip. It is admitted by her so-called attorneys in fact that she was to have no interest in the land. For a long time she directly and positively repudiated Eaton and Merritt as her attorneys in fact, denying that they acted for her in any capacity whatever. Afterwards, and but a few days prior to the hearing, she ratified by deed what had been done by them.

This ratification, it is evident, was procured at the solicitation of Eaton or Merritt, or both, and for a consideration. But such ratification does not change the fact that the improvements and location, though made under the guise of a power of attorney, were made, not under the direction

and in the interest of the scripee, but for the benefit solely of another not even known to the scripee, viz., Eaton, who had inserted his name as attorney in the power executed in blank. If the location of the scrip was illegal and invalid, then the deed of ratification could not give it validity—could not vitalize that which originally had not in it the germ or essence of legal vitality.

This case is, in all essential particulars, like that of Joseph W. Allen *et al. v.* Lewis Merrill *et al.*, decided by me this day, so far as the method of making the scrip locations is a matter of concern, and the reasons of that case are in this particular applicable to this. Following the ruling of that case, I must hold that the scrip locations here in question are invalid, and your office decision so holding is affirmed.

There remains for disposition the rights of Hyde and McDonald. It is asserted that the case is not in such a position that any determination ought to be made as to these claims, and that must be determined by a view of the record and proceedings taken.

It appears that on the 9th day of October, 1884, Hyde filed with the Register a paper addressed to the Register and Receiver, in the caption described as being "An application for leave to contest the pretended entry with Sioux-Half-Breed Certificate No. 19 E. for one hundred and sixty acres issued to Orilie Moreau, on November 24, 1856, and attempted to be located on the following-described land, to wit," describing the land; and that in that application, after the allegation attacking the location, the following appears:

"That said contestant is a single man over 21 years of age, and has declared his intention to become a citizen of the United States; that he does not own 320 acres of land

in any State or Territory; that he has not left land of his own in this State to reside on the public lands, and that he has never heretofore exercised his right under the pre-emption law.

"That heretofore, to wit, on the 20th day of August, A. D. 1884, the said contestant made settlement on the said described land with a view to inhabiting and cultivating the same for his own exclusive use and benefit, and intends to make his declaratory statement for said land under the pre-emption laws of the United States as soon as the surveyed plat of township 63 N., Range 11 W., of the 4th P. M. shall be returned to the United States land office at Duluth, Minn.

"Wherefore your petitioner requests that this contest may be granted and a day set for the hearing thereof."

Attached to this application was an affidavit of verification, sworn to on the 29th of September, 1884.

This application is stated in the Commissioner's order for a hearing, hereinafter mentioned, to have been transmitted by the Register to the General Land Office October 31, 1884, and to have been supported by a copy of an affidavit of the scripee, which has been before spoken of.

On the 20th of July, 1885, Hyde made application to file the declaratory statement previously mentioned in this opinion, which was rejected, and thirty days allowed by the Register for appeal. On the 25th day of August, 1885, the Register transmitted Hyde's appeal from that decision to the General Land Office.

All the proceedings on the part of McDonald in respect to the land claimed by him correspond exactly with those of Hyde as to the land claimed by him, and were made by the same attorneys and at the same time respectively.

Afterward, on the 14th day of November, 1885, the Commissioner of the General Land Office, by letter "C" of that date, ordered a hearing, in which, after reciting the allegations for and against the validity of the scrip, he proceeds:

"In view of the conflicting statements respecting the legality of these locations, I deem it proper that a hearing should be had, that the respective parties may have an opportunity to submit such proof as they may have *in support of their allegations*, and that this office may be possessed of *all the facts possible* in the matter, and the same is hereby ordered.

"You will notify all parties in interest of the time and place of hearing, and at the proper time thereafter you will transmit to this office the testimony taken thereat, with your opinion thereon."

Under this order of the Commissioner, when the hearing came to be held, it seems to have been assumed by all parties that the rights of Hyde and McDonald as pre-emptors were involved; and voluminous testimony was taken, not only with respect to the rights of the scrip locators, but with respect to the rights of the pre-emptor. Upon the conclusion of the hearing the Register and Receiver, being of opinion that the scrip locations were valid, disposed of the pre-emptors' claims as follows:

"The *bona fides* of Hyde and McDonald, or their rights under the pre-emption law, need not be considered here, as the question of their claims is contingent upon their ability to set aside the scrip locations and thus render the land subject to pre-emption settlement.

"Upon this showing of fact, we conclude that the contestants have failed to make out a case, and that the proceedings should be dismissed. It is so ordered."

The decision of the Assistant Commissioner makes no allusion to the contest in regard to Hyde and McDonald, simply reversing the decision of the local officers as to the validity of the scrip location.

Upon examination of the testimony taken at the hearing, the following appears in the examination of Hyde:

"Q. Did you have any contract with Mr. White, in writing or otherwise, by which he was to receive any compensation or interest in the land?

"A. Yes; there was a contract.

"Q. Where is it?

"A. I don't know.

"Q. When and where did you last see it?

"A. I have not seen it since it was drawn up by M. White.

"Q. What did it contain?

"A. It contained that, when I proved up, I was to secure him a one-half interest."

McDonald testified as to the land covered by his pre-emption claim:

"Judge White has no interest in it. There is an understanding that he is to have an interest in it if we succeed in this trial; he is to have a half interest. The arrangement with Hyde is the same as mine. White is to have half if we succeed in this.

"James H. Power is also to have an interest in it if we succeed. I don't know how much he is to get. I agreed to give him an interest if we succeed in getting the land."

He further testified:

"Mr. White is paying the expenses of the claim with the understanding that he is to have half of it after we secure it."

Again:

"I am to let him have an interest in the land when I get it, to pay him for his time and services. The contract I have with Mr. White for his one-half is in writing."

When asked how he could give White a half interest unless he should deed to him one-half, he answered, "I could not very well."

White, when put on the stand, testified that after diligent search he was unable to find the contract.

Further evidence than that above quoted from the testimony of Hyde and McDonald is unnecessary to show that they have, by contracts which they admit having made, disqualified themselves from taking the land under the pre-emption law.

Counsel, in one of the briefs in the case, aver as to McDonald that the records of your office will show that he has already exhausted his pre-emption right by having made a pre-emption filing, and having filed a formal relinquishment of his claim thereunder. I have not attempted to test the correctness of this averment by an inspection of the records of your office. It is deemed unnecessary in view of the testimony of Hyde and McDonald, the pre-emption claimants, as to their contract to sell.

The testimony of the two claimants establishes beyond question that the statements made in their applications to contest, that their settlements were made wholly for their own use and benefit, was not well founded, and that it would be impossible for either of them to make the affidavit required by section 2262, R. S., "that he has not directly or indirectly made any agreement or contract, in any way or manner with any person whatever, by which the title which he might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person except himself."

In view of this record and proof, it appears to be the duty of the Department to dispose of these claims of pre-emption. A hearing has been had upon the validity of them, in which the evidence was adduced fully, and upon which the material facts appear to have been sufficiently elicited to leave no doubt. Whatever rights they might have established would, under a familiar rule of the De-

partment, have been regarded as fixed at the time when they made their application to file. Their applications to file must be treated as if they had been allowed, subject to the rights of others; and it now appears that they ought to be canceled, if filed. Their appeal (which is sent up in the record) from the rejection of their applications, appears to bring the whole matter before the Department; and in the exercise of the power of supervision vested in the Department by law, it seems to be demanded that upon this disclosure of the facts the proper action should be taken. If there had been no hearing upon this question, the proper action would be, upon a suggestion of such information, to direct a hearing to be had; but inasmuch as a hearing has been had, and as the testimony which shows the absolute impossibility of perfecting a pre-emption title in these claimants has proceeded from themselves, testifying under oath, there appears no reason for directing a further hearing.

If their declaratory statements were now to be filed as of that date, the duty would rest on the Department to cancel them, in accordance with the ordinary practice in such cases.

This leaves to be considered one other branch of the case as now presented by the record. On April 28, 1887, one Fred L. Huntress filed formal applications to contest the pre-emption claims of said Hyde and McDonald, respectively, his charge being that said claims were initiated not in good faith to appropriate the lands to their exclusive use, but for speculative purposes, they having agreed to convey title to other parties when procured by them.

Huntress, in his affidavit of contest, asks that a hearing be ordered to enable him to substantiate by competent proof the charges made.

Counsel for Huntress, however, argues in a brief recently filed, that further hearing is unnecessary, and that the

asserted claims of Hyde and McDonald may properly be rejected and finally disposed of on the record as it now exists.

It is therefore asked that such action be taken, and the scrip locations, as well as the pre emption claims of said Hyde and McDonald being disposed of and the record cleared of any claim to the land, that he (Huntress) be accorded the preference right of entry on said lands.

Notwithstanding the foregoing judgment to some extent was anticipated by the petition, this proceeds on the record, all of which had been made up before Huntress came into the case as a pretended contestant, and was in no way or manner aided by what he did. His acts had nothing whatever to do with bringing about the rejection of either the scrip claims or those of Hyde and McDonald. Besides, an application to file a declaratory statement is hardly subject to contest. He is, therefore, in no position to claim a preferred right of entry as a successful contestant, and his application to be so considered and treated must be denied. This disposes of all the claims and asserted claims to the land, so far as disclosed by the record before me, and leaves the land in question open to disposal under the public land laws of the United States applicable thereto, and such is the judgment of this Department.

The papers in the case are herewith returned.

Very respectfully,

WM. L. VILAS,
Secretary.

APPENDIX No. 2.

Decision of Secretary Noble of January 28, 1891, *in Case of Hyde et al. v. Eaton et al.*, 12 *L. D.* 157.

I have considered the motions filed by the parties in interest asking for a review of departmental decision of February 18, 1889 (unreported), in the case of Thomas W. Hyde and Angus McDonald *v.* Frank W. Eaton, and Orilie Stram and Fred F. Huntress, second contestant, involving Sioux Half-Breed scrip locations of lots 3, 5 and 6, and the S.E. ¼ of the N.W. ¼ Sec. 30, T. 63 N., R. 11 W., under certificate 19 "D," and of lots 1 and 2 and the S.W. ¼ of the N.E. ¼, and the N.W. ¼ of the S.E. ¼, same section, under certificate 19 "E," in the Duluth, Minnesota, land district; also the application of Thomas W. Hyde to file pre-emption declaratory statement for lots 5 and 6, the S.E. ¼ of the N.W. ¼, and the N.E. ¼ of the S.W. ¼ of said section, and the application of Angus McDonald to file pre-emption declaratory statement for lot 2, the N. ½ of the S.E. ¼ and the S.W. ¼ of the N.E. ¼ of said section 30; and also the application of Huntress to contest both the scrip locations and the claims of Hyde and McDonald.

The facts pertaining to these various claims are sufficiently set forth in the decision complained of, and it is not deemed necessary to recapitulate those facts here.

On the part of the scrip claimants, twenty-one specifications of error are assigned. These specifications, except such as are hereinafter specifically mentioned, present questions which were presented in the motion for review in the case of Allen *et al. v.* Merrill *et al.*, and which are in

the decision this day rendered therein fully discussed. The conclusion reached there is adopted here, and further discussion of those questions is unnecessary.

* * * * * * *

This disposes of all specifications of error in the motion for review filed in behalf of the claimants under said scrip locations adversely, and the conclusion reached in the original decision in regard to these locations will be adhered to.

The motion for review filed in behalf of the pre-emption claimants contains sixteen specifications of error, alleging in substance that the merits of these claims were not brought in question by the order for a hearing or the notice issued thereon; that the testimony touching the validity of those claims should have been excluded; that even admitting such testimony, it is not sufficient to warrant the conclusion reached; that the testimony was misquoted in said decision; that it was error to hold that the appeal of these parties from the action of the local officers rejecting their respective applications to file declaratory statements, which appeal was never acted upon by your office, was sufficient to bring their claims before this Department for consideration; and that it was error to refuse them a preference right of entry.

On October 9, 1884, Hyde and McDonald each filed a paper, duly verified by affidavit, termed "an application for leave to contest" the scrip locations mentioned herein, in which applications the qualifications of the respective parties as pre-emptors were duly set forth, and in each of which it was alleged that the party making the same had settled upon the land described therein "for his own exclusive use and benefit" with the intention of filing declaratory statement therefor under the pre-emption laws. On July 20, 1885, these parties each presented his declaratory statement

for the tract claimed by him, which statements were rejected by the local officers. From this action of the local officers the applicants each filed an appeal, which appeals were transmitted to your office August 25, 1885. With these facts thus presented, your office ordered a hearing. At this hearing testimony was submitted for and against, not only the scrip locations, but also the claims of these pre-emption applicants. The local officers found in favor of the validity of the scrip locations, and in view of that fact, declared it unnecessary to consider "the *bona fides* of Hyde and McDonald or their rights under the pre-emption law."

The decision rendered in your office made no disposition of the applications of Hyde and McDonald. The applications of these parties to file pre-emption declaratory statements came up with the record in the case and it was entirely competent for this Department, in the exercise of the jurisdiction conferred upon the head of it, to consider and determine all questions presented by the record. The testimony alleged to have been misquoted is contained in the following extract from the testimony of Hyde found in the original decision:

Q. Did you have any contract with Mr. White in writing or otherwise by which he was to receive any compensation or interest in the land?

A. Yes; there was a contract.

Q. Where is it?

A. I don't know.

Q. When and where did you last see it?

A. I have not seen it since it was drawn up by Mr. White.

Q. What did it contain?

A. It contained that, when I proved up, I was to secure him a one-half interest.

It seems the last answer should have read: "It contained

that, when I proved up, I was to secure him *on* a one-half interest." This change does not, however, destroy the effect of the testimony taken as a whole or necessarily demand a different conclusion. There is testimony to sustain the finding on this particular phase of this case, and it is not shown that such finding was against the palpable preponderance of the evidence. In such cases a review will not be allowed. Croghan Graves (9 L. D. 463.)

After the filing of the motions for review herein, to wit, on July 10, 1889, affidavits of Hyde, McDonald, and S. F. White were filed. Hyde in his affidavit sets forth in substance that he settled upon this land and built a house on the N.E. ¼ of the S.W. ¼ of said Section 30, wherein he has continued to reside; that his improvements have cost, as he verily believes, to exceed $3,000; that whatever agreement he had with White did not affect or refer to the above-described tract, upon which his house stands, but referred only to the land claimed under the scrip locations; that said agreement was "That if at the time said contest should be ended in favor of affiant said affiant should be owing for services in contest, then and in that event he should secure the payment of said services upon the undivided one-half of said land"; that as a matter of fact he has paid his attorney from time to time in cash and has paid him in full, and that affiant never contemplated giving said attorney any interest in the land, but always contemplated paying him in cash for his services. McDonald sets forth that his agreement with White was that he would secure the payment of any sum that might be due for attorney fees at the close of the contest by giving a mortgage on a one-half interest in said claim, and that he has already paid his attorney in full in cash. White's statement, in so far as it relates to the matter of the contract between him and these parties, is as follows:

Deponent further says that, while he has not seen the written contract between himself and Hyde for a long time, and cannot give the exact terms of said contract, that he does remember that said contract contained a description of the lands supposed and intended to be affected thereby and that description does not include the northeast quarter of southwest quarter of section No. 30 aforesaid.

This is apparently an effort to take the tract described out of the contract mentioned and to clear it of the taint attaching to the claim. A contract made before entry to convey any part of the land filed for renders invalid the whole claim. The statements made in these affidavits do not, in my opinion, destroy the force of the testimony given at the hearing or call for further action of these claims. (Smith *v.* Custer *et al.*, 8 L. D., 269.)

The question as to whether these parties, Hyde and McDonald, or either of them, were entitled to a preference right of entry was not expressly decided in the decision complained of, but it may perhaps be said that question was inferentially decided adversely to them by the declaration that the land was "open to disposal under the public land laws of the United States applicable thereto." Any question as to their preference right of entry would arise only upon application within thirty days after due notice of the cancellation of the scrip locations to exercise such right, and it ought not to be decided prior to that time. Saunders *v.* Baldwin (9 L. D., 391), and authorities there cited.

The decision complained of will be modified to the extent of saying that the question as to a preference right of entry in either of these parties is not decided. It is not intended herein to express any opinion whatever upon that question.

It is alleged that a part of the land in question has been entered by other parties since the promulgation of said de-

partmental decision, and if this be true those parties will be entitled to notice if the attempt shall be made to exercise a preference right of entry.

* * * * * * *

This disposes of all questions arising under the various motions for review, and the decision complained of is modified in the particulars indicated herein.

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APPENDIX No. 3.

Part of Commissioner's Decision of September 8, 1893, *in Case of McDonald et al. v. Hartman et al.*

* * * * * *

But even if this were otherwise, and the pre-emption claims were now the proper subject of consideration, I am entirely satisfied, upon the evidence, that the grounds upon which the two decisions referred to proceeded were well-founded in point of fact. Without attempting at length to discuss the voluminous testimony upon this particular point, I deem it sufficient to say that a careful consideration thereof satisfies me of the existence of an illegal and prohibited contract in respect to the lands claimed by these parties under the pre-emption law. The testimony in the case at bar clearly and conclusively establishes that fact, even if it did not satisfactorily appear in the proceeding resulting in the two decisions mentioned. I find from the testimony in the case at bar that the pre-emption claims of these parties were not initiated in good faith, but were established under a written contract by the terms of which the title procured from the United States would enure, in part at least, to others than the claimants and that for this reason, as found and determined by Secretary Vilas and Noble, the claims are invalid and must upon their merits be rejected.

I accordingly find and hold that the claims of these parties here presented are invalid and must be denied.

* * * * * *

APPENDIX No. 4.

Decision of Secretary Smith of December 21, 1894, *in case of McDonald et al.* v. *Hartman et al.*, 19 *L. D.* 547.

The land here involved in this appeal is located in the Duluth, Minnesota, land district, and is described as follows: lots 3, 5, and 6, and the S.E. ¼ N.W. ¼, and N.W. ¼ S.E. ¼ of Sec. 30, T. 63 N., R. 11 W.

The history of the case, as gleaned from one of the most voluminous records probably ever transmitted to the Department, is briefly as follows:

Prior to the beginning of the controversy, said tracts were covered by certain Sioux Half-Breed scrip locations, made by one Frank W. Eaton, as the attorney in fact of Orille Stram, which locations, by reason of conflict with pre-emption claims asserted by Angus McDonald and Thomas W. Hyde, were held invalid by this Department, February 18, 1889. Not only did said decision (unreported) hold said scrip locations invalid, but it also held the pre-emption claims of Hyde and McDonald to be invalid, and cleared the record of all conflicting claims to said land, as revealed by that case, in the following language:

This disposes of all the claims and asserted claims to the land, so far as disclosed by the record before me, and leaves the land in question open to disposal under the public land laws of the United States applicable thereto, and such is the judgment of this Department.

That decision, on motion for review, was reaffirmed January 28, 1891 (12 L. D. 157), with the single modification

that the Department declined to pass on the claim of Hyde and McDonald that, as successful contestants, they were entitled to the preference right to enter said land, the language of the decision on that point being as follows:

Any question as to their preference right of entry would arise only upon application within thirty days after due notice of the cancellation of the scrip locations to exercise such right, and it ought not be decided prior to that time. Saunders *v.* Baldwin (9 L. D., 391), and authorities there cited.

The decision complained of will be modified to the extent of saying that the question as to a preference right of entry in either of these parties is not decided. It is not intended herein to express any opinion whatever upon that question.

The departmental decision of February 18, 1889, *supra*, was promulgated by your office on February 19, and was received by the local office at Duluth on the evening of February 22, a national holiday. On the morning of February 23, prior to nine o'clock, a crowd of men, some of whom had been there for several hours, was gathered in the hall or lobby in front of the door of the local office. At nine o'clock the door was opened from the outside by a clerk of the local office, and the crowd rushed in. In a very brief space of time a number of applications for different subdivisions of the lands in question were presented to the Receiver. The applications made by the parties hereto, being the only ones presented for consideration herein, were as follows:

Emil Hartman: Lot 6, with Porterfield warrant No. 74: S.E. ¼ N.W. ¼ with Valentine scrip E. No. 117; N.W. ¼ S.E. ¼, with Porterfield warrant No. 1; and the additional hd. application of Thos. Reed for lots 1 and 2, and S.W. ¼ N.E. ¼, all said lands being in said Sec. 30.

Charles P. Wheeler, by his attorney, Warren N. Draper, offered to file on S.E. ¼ N.W. ¼, Valentine scrip E. No. 259; S.W. ¼ N.E. ¼, Valentine scrip E. No. 270; N.W. ¼ S.E. ¼, Porterfield warrant No. 98. Also as attorney in fact of one David Moyer, Wheeler, by said Draper, presented soldier's additional homestead certificate for lots 3, 5 and 6 of said Sec. 30; also as attorney for Warren Wing, Wheeler, by the said Draper, presented soldier's additional homestead certificate for lot 2 for said Sec. 30.

Reuben E. Lawrence: by Samuel C. Brown, his attorney in fact, filed soldier's additional certificate for lot 6 and S.E. ¼ N.W. ¼ of said Sec. 30, and

William M. Stokes: by said Brown, as attorney in fact, filed soldier's additional certificate for the S.W. ¼ N.E. ¼, and the N.W. ¼ S.E. ¼ of said Sec. 30.

William Alden and Houghton E. James, by J. K. Person, their attorney, presented homestead applications, the former for lots 3, 5 and 6 and the S.E. ¼ N.E. ¼ (lot 2), and the latter for lots 1 and 2 and the S.W. ¼ N.E. ¼ and N.W. ¼ S.E. ¼ of said Sec. 30—both of said applications having been presented and rejected on February 19 preceding, of which reference will be made later on.

Daniel C. Sullivan and Carroll M. Mauseau, during the afternoon of February 23, filed homestead applications, the former for lots 3, 5, and 6 and the S.E. ¼ N.W. ¼, alleging settlement thereon February 22, 1889, and the latter for lots 1 and 2 and S.W. ¼ N.E. ¼, N.W. ¼ S.E. ¼, alleging settlement thereon February 22, 1889.

The question as to the priority of the applications presented at the opening of the office on the morning of the 23d was taken under advisement by the local officers until later in the day. Some time during the afternoon they gave their decison, awarding to Emil Hartman all the lands applied for by him as above set forth, and to David Moyer,

the two forty-acre tracts applied for by him, as above stated, and rejected all the other applications made for conflict with the allowed claims of Hartman and Moyer. From this action of the local officers various appeals were taken. Pending those appeals, however, a motion to review the departmental decision of February 18, 1889, was filed by Hyde and McDonald, which was finally disposed of by the decision of January 28, 1891, *supra*.

In closing out that case (the motion to review) and upon consideration of the appeals above referred to, your office, by letter "H" of March 13, 1891, ordered a hearing to be had, in order that all the parties to the controversy might have an opportunity to present their claims and evidence in support thereof.

The hearing was set for June 8, 1891. Prior to that date, however, viz., on April 2, 1891, Hyde made homestead application for lots 5 and 6, the S.E. ¼ N.W. ¼ and N.E. ¼ S.W. ¼ of said sections, claiming the same by virtue of his alleged preference right of entry, and by virtue of his settlement made on the last-named tract August 20, 1884, and his subsequent residence thereon. On the next day (April 3) McDonald made homestead application for the N.W. ¼ S.E. ¼ of said Sec. 30, claiming the same on the same grounds asserted by Hyde, viz., preference right of entry and settlement, residence and improvement.

On the day of the hearing (June 8, 1891) Hyde filed a petition to amend his homestead application of April 2, 1891, by omitting therefrom the N.E. ¼ S.W. ¼ of said Section 30, asserting, however, that he did not intend thereby to abandon his claim to that tract, but that he would at the proper time assert his claim thereto. His petition was allowed and the application amended as requested.

The hearing before the local office, which extended over a period of nine or ten months, resulted in the following decision by that tribunal; it rejected the claims of Hyde and McDonald, and Mauseau and Sullivan, and held that the lands were open to disposal under the public land laws from the date of the Secretary's decision, viz., February 18, 1889; that the applications of Alden and James were properly and legally presented February 19, 1889, and awarded to James the N.W. ¼ S.E. ¼ of said Sec. 30, the remaining tracts applied for by him having been inadvertently patented to Reed on his soldier's additional certificate, and hence taken out of the jurisdiction of the Land Department. To Alden was awarded lots 3, 5, and 6, excluding the other tract applied for, because it was not contiguous to the other tracts embraced in his application. To Wheeler was awarded the S.E. ¼ N.W. ¼ of said Section 30, upon the finding that his application was prior to that of Hartman.

Upon appeal, your office, by its decision of September 8, 1893, concurred in the decision of the local office in its rejection of the claims of McDonald and Hyde and Sullivan and Mauseau, but reversed it as to Alden and James, holding that said lands were not subject to disposal under the public land laws until the Secretary's decision, regularly communicated through the General Land Office, was received at the local office, or at most from the date of the promulgation of the Secretary's decision by the Commissioner of the General Land Office. Said decision then awarded to Wheeler, on the finding that his application was first in point of time on the morning of February 23, 1889, the S.E. ¼ N.W. ¼ and the N.W. ¼ S.E. ¼ of said Section 30, and held Hartman's three scrip locations for cancellation. As to lots 3, 5 and 6, embraced in the additional homestead application of Moyer, application to contest said entry had

been filed by one Billson and subsequently by one Monahan, alleging, in substance, that Moyer was dead on February 23, 1889. Your office letter "H" of March 13, 1891, *supra*, ordering a hearing, directed Billson and Monahan "to attend the hearing and present their testimony." Your office decision held that they failed to present any testimony, and that hence their applications to contest were still pending, subject to future consideration on the determination of this case. And it was further declared that should that decision become final, Moyer's entry would be made to cover the land originally applied for on February 23, 1889, as shown by his homestead application.

An appeal by the parties adversely affected by said decision brings the case to this department. Taking them in the order presented at the trial and in the arguments and briefs of counsel, the first requiring consideration are the claims of Hyde and McDonald.

At page 23 of their brief they declare that "they do not claim the land in controversy by virtue of any settlement or pre-emption rights," and at the bottom of page 24 of said brief they assert that "the question of these pre-emption rights is not in the case." Notwithstanding these statements, however, there is in the record (1) their homestead applications, containing, as stated, an express claim to these lands by virtue of settlement thereon August 20, 1884, and subsequent residence and improvement; (2) a great amount of testimony with reference to said settlement, residence and improvement, said settlement, etc., being the same on which they based their pre-emption right to said lands.

If there ever was a question to which the doctrine of *res adjudicata* applied it is that of the settlement and pre-emption rights of McDonald and Hyde to the lands embraced in Orille Stram controversy, a part of which is included in their homestead application of April 2 and 3, 1891.

There must of necessity be somewhere an end to controversy. Their settlement and pre-emption rights to these lands involved in the controversy concerning the Sioux Half-Breed scrip locations of Orille Stram were fully considered, and finally determined by the Department adversely to them in its decision February 18, 1889, *supra*, and in its review of that decision January 28, 1891 (12 L. D. 157), and the introduction into the record of this case of the evidence referred to cannot resurrect and revitalize that dead issue.

In your office letter "H" of March 13, 1891, directing a hearing, it was stated, with reference to Hyde and McDonald, that—

> Should they set up any claim as preferred contestants in regard to lots 5 and 6 and S.E. ¼ of N.W. ¼ and N.W. ¼ of S.E. ¼ of said section 30, you will allow them full opportunity at the hearing directed herein to present their testimony and to be heard with others.

This clearly limited the inquiry, so far as they were concerned, to their "claim as preferred contestants" as to their alleged preferred right to enter the lands described in said office letter "H." The local office so treated it, and in its decision denied them a preference right to enter said lands, holding, as stated, that they are not contestants under the act of May 14, 1880. Your office, on appeal, affirmed the decision of the local office in that respect, and their appeal here from your office decision brings before me for consideration, so far as they are concerned, that single question and none other.

To entitle them to a preference right of entry it must appear that their action against the Stram scrip locations was a contest under the act of May 14, 1880.

The proceedings against the Stram scrip locations were

separately instituted by Hyde and McDonald on October 9, 1884. At that time the lands were unsurveyed. The papers or pleadings by which the proceedings were begun are, with the exception of names and description, identical. After averring the invalidity of the scrip locations, each pleader proceeds in the exact language of the law to state his qualifications as a pre-emptor. He then states the date of his settlement on said land, that it was made with a view of inhabiting and cultivating it for his own exclusive use and benefit, and that as soon as the township plat was filed in the local office at Duluth, he intended to file his pre-emption declaratory statement for said land.

It will at once be seen that those pleadings asserted the superiority of the pre-emptor's title over that of the scrip locator, that it brought the two titles squarely in conflict, necessitating a judgment as to which was the better, and that the litigation following was a contest between conflicting claims. There is no intimation in the pleadings themselves that the proceedings are instituted under the act of May 14, 1880, and they certainly bear no resemblance whatever to the familiar affidavits of contest under that act. It is shown by the evidence in this case that on the trial of that case before the local office, a question as to who should pay the land-office fees arose, and that the suggestion was made that McDonald and Hyde, as the contestants, should pay the fees. Thereupon their attorney declared that the proceedings were not contests under the act of May 14, 1880, but contests between conflicting claims, and hence not within the rule requiring the contestant to pay all of the land-office fees, but that the fees should be apportioned between the parties, each paying their own fees, and that the matter was adjusted in that way.

Again, it is apparent that if those proceedings were in-

stituted by Hyde and McDonald for the purpose of securing a preference right of entry to the lands covered by the scrip locations, they would have exercised that right within thirty days from the date of notice of the decision of February 18, 1889. But, instead of that, they each filed a motion to review and reverse that opinion, and thereby assumed a position utterly inconsistent on the part of intelligent persons seeking a preference right to enter the lands involved in that controversy. Their every act has been that of persons consistently endeavoring to assert and establish their title under the pre-emption laws, and, incidentally, clear from the record the Orille Stram scrip locations, which were, in effect, a cloud on their pre-emption title.

The claim of a preference right to enter these lands as successful contestants evidently was an afterthought that came to them when casting about for some means by which to extricate themselves from the wreck in which the decision of February 18, 1889, involved them.

There is no theory presented by this case in any of its manifold aspects by or under which the status of Hyde and McDonald, in the controversy with Orille Stram *et al.*, could be construed to be that of contestants under the act of May 14, 1880. And the decision of your office, rejecting their applications to enter the lands embraced in their respective homestead applications and denying them a preference right to enter the same, as alleged successful contestants, is, in that respect, hereby affirmed.

* * * * * * *

The effect of the foregoing findings and conclusions is, to reject the claim of Thomas W. Hyde and Angus McDonald, of Daniel C. Sullivan and Carroll M. Mauseau, of Reuben E. Lawrence and William M. Stokes, of David Moyer and of Charles P. Wheeler, to any portion of the

premises in dispute. And to reject the applications of W. W. Billson and Thomas J. Monahan to contest Moyer's entry.

And the further effect of said findings and conclusions is, to award to William Alden lots 3, 5, and 6, of Sec. 30, T. 63 N., R. 11 W.; to Emil Hartman the S.E. ¼ of the N.W. ¼ of said Sec. 30, and to Houghton E. James the N.W. ¼ of the S.E. ¼ of said Sec. 30, T. 63 N., R. 11 W.

The outstanding, uncancelled patent, inadvertently issued to Thos. Reed, for lots 1 and 2, and the S.W. ¼ of the N.E. ¼ of said Sec. 30, deprived the Department of jurisdiction to extend the effect of this decision to those tracts.

Your office decision of September 8, 1893, is therefore modified as above stated.

APPENDIX No. 5.

Decision of Secretary Noble, of May 31, 1892, in Case of Hyde et al. v. Warren et al., 14 L. D., 576.

By your letter dated May 10, 1890, are transmitted the papers in the case of Thomas W. Hyde *et al. v.* James H. Warren, on the appeal of the former from the decision of your office dated October 16, 1889, sustaining the latter's location, allowed by the local office on October 15, 1885, R.R. No. 79, of lot 7, and the N.E. ¼ of S.W. ¼ of section 30, T. 63 N., R. 11 W., 4th P. M., Duluth, Minnesota, under the provision of the seventh clause of article two of the treaty of September 30, 1854 (not 1885 as stated in said decision), with the Chippewa Indians (10 Stat., 1110), and overruling the several applications to contest said location and enter the land covered thereby.

* * * * * *

It is alleged in the brief of counsel for Hyde, filed at the oral argument, that he applied on April 10, 1886, to contest said Warren's location on the ground that he had a prior pre-emption right to the land claimed by him; that you, on December 22, 1888, directed the local officers to order a hearing upon said application, and afterwards, to wit, on March 8, 1889, revoked said order without notice to him; that in July of the same year Hyde filed a motion to set aside said order of March 8, 1889, which motion has not yet been acted upon by you; that on February 23, 1889, he filed another application in the local office to obtain, under the pre-emption law, the said N.E. ¼ of the S.W. ¼, and also to be allowed to contest the said Warren location;

that on October 29, 1889, Hyde again made application to contest said Warren location and filed, in support thereof, his own and the affidavit of two other persons; that you, on October 16, 1889, held that the Warren location was valid and "utterly overlooked and ignored the claim of Hyde." It is further alleged in said brief that Hyde, as a successful contestant, on April 2, 1891, applied at the local land office to enter under the homestead laws three tracts of land in said section involved in the case of Hyde *et al. v.* Eaton *et al.*, (on review) 12 L. D., 157, upon which application a hearing was ordered before the local office and is still pending. It is quite evident that if said Warren scrip location be sustained, the claims of the other parties must fail, and the first question to be determined is, are the allegations of the contestants, or either of them, sufficient to require either a hearing to determine the validity of said Warren's location, or, upon the conceded facts, should the Chippewa scrip location be canceled and the land awarded to the first legal applicant? The Warren location having been presented to and allowed by the local officers, *prima facie* segregated the land covered thereby.

* * * * * *

From the record before me, I am satisfied that the contest affidavit of Hartman, having been first filed in the local office and sufficiently corroborated, must be held to take precedence of the other applications for contest. From his own showing, the contest application of Hyde, corroborated by the affidavits of Powers and McDonald, was not filed until October 29, 1889, long subsequently to the application of Hartman, Chandler and Barrick, and it appears that the hearing ordered upon his application of April 10, 1886, was revoked by you for the reason that the Department held in Hyde *et al. v.* Eaton *et al.*, on February 18, 1889, and affirmed on review (12 L. D., 157), that Hyde's pre-

emption claim for said tract was illegal. Besides, Hyde's motion to set aside said order was not made until July 6, 1889, and his application to contest, supported by affidavits, was not filed until October 29, 1889, and therefore cannot be considered until the prior contests shall have been decided. Durkee *v.* Teets (4 L. D., 99); Woodward *v.* Percival *et al.* (*idem*, 234); Conley *v.* Price (9 L. D., 490).

In addition to the foregoing it may also be observed that, according to his own showing, Hyde is now seeking to enter three other tracts under the homestead law. He cannot have two settlement claims for different tracts at the same time.

Upon a careful consideration of the whole matter, I conclude that the allegations set forth in Hartman's contest affidavit are sufficient to require a hearing to be had to afford him an opportunity to prove the same; that the other applications of contest must be held to await the result of said contest; that Hyde can claim nothing by virture of his pre-emption claim for said N.E. ¼ of S.W. ¼, as against the Government, because it has been decided by the Department that his said settlement claim was illegal, which decision was affirmed on review.

The decision of your office is therefore reversed, and you will direct a hearing to be ordered, in accordance with the rules of practice, upon Hartman's said allegations of contest.

APPENDIX No. 6.

Secretary Noble's decision of November 12, 1892, *in case of Hyde et al. v. Warren et al.*, 15 *L. D.* 415.

Motions for review of departmental decision of May 31, 1892 (14 L. D. 576), in the case of Thomas W. Hyde *et al. v.* James H. Warren *et al.*, involving lot 7 and the N.E. ¼ of the S.W. ¼ of Sec. 30, T. 63 N., R. 11 W., 4th P. M., Duluth, Minnesota, have been filed as follows: one in behalf of Jesse G. Barrick, one in behalf of Joseph H. Chandler, two in behalf of James H. Warren, and one in behalf of Thomas W. Hyde.

It seems unnecessary to set out at length the facts in the case, and reference is, therefore, made to the decision complained of, for those facts and the statement of the various claims to the land.

* * * * * * *

In the motion in behalf of Hyde the following assignment of errors is made:

1. Error in passing upon the rights of Hyde as a pre-emption claimant or otherwise, without giving him any hearing whatsoever in this case.
2. Error in holding that, as to James H. Warren and his scrip location, Hyde's right as a pre-emption claimant was *res adjudicata*.
3. Error in utterly disregarding Hyde's claim to the land in question.
4. Error in neglecting and refusing to give Mr. Hyde a hearing upon the merits of his claim in this case.
5. Error in holding that the Warren scrip location, or that the claims of any of the contestants, took priority of, or were superior to, the claim of Hyde to this land.

6. Error in utterly and entirely failing to give Hyde his day and hearing in court as against the Warren scrip.

7. Error in holding that what occurred in another case, and between different parties to the record, was *res adjudicata* as to the Warren claim in this case.

8. Error in holding that the fact that Hyde, as a successful contestant, had applied for a priority of entry to three other tracts cut him off or debarred him from asserting his rights in this case.

No argument has been presented in support of this motion. The right of Hyde as a pre-emption claimant, under the settlement upon which he bases his claim to this land, was involved in the case of Hyde *et al. v.* Eaton *et al.*, decided February 18, 1889 (not reported), and again, on motion for review, on January 28, 1891 (12 L. D., 157). It was there found that the settlement was not made in good faith for his own use and benefit, and that he therefore acquired no rights by virtue of that settlement. That decision disposed of his claim, not only as to the particular tracts of land involved in that case, but also as to all the tracts which he claimed under such settlement; that is, his claim as a whole was held to be invalid after a full investigation and opportunity to Hyde to be heard in defense thereof. This being the case, it was wholly unnecessary to again go over the same ground when some other person not a party to the former proceedings presented a claim to part of the land. It was not error to dispose of Hyde's pre-emption claim, as it was done in the decision complained of, by citing the former decision of the Department holding it invalid. His rights as a contestant were not definitely disposed of in the decision attacked by this motion, but consideration thereof was simply postponed until the prior contests could be decided. The motion for review presents no specific objection to this action, nor could any

objection thereto be sustained. For the reason given, the motion on behalf of Hyde is hereby denied.

* * * * * *

While these motions were each open to the objection that they presented no question of either law or fact that was not fully presented and considered when the decision complained of was rendered, and might very properly have been denied upon that ground alone, yet I have seen fit to take up and consider again the various points raised. After such examination and consideration, I find no good reason for revoking or changing that decision, and said motions are each hereby denied.

APPENDIX No. 7.

Decision of Secretary Smith of July 20, 1894, in case of Hartman v. Warren et al., 19 L. D., 64.

On the 21st of May, 1892, the Department directed a hearing in the case of Emil Hartman *v.* James H. Warren *et al.*, then entitled Hyde *et al. v.* Warren *et al.* (14 L. D., 576), (affirmed on review, in 15 L. D., 415), in these words:

Upon a careful consideration of the whole matter, I conclude that the allegations set forth in Hartman's contest affidavit are sufficient to require a hearing to be had to afford him an opportunity to prove the same; that the other applications of contest must be held to await the result of said contest; that Hyde can claim nothing by virtue of his pre-emption claim for said N.E. ¼ of the S.W. ¼ as against the Government, because it has been decided by the Department that his said settlement claim was illegal, which decision was affirmed on review.

The land involved in this controversy is lot 7, and the N.E. ¼ of the S.W. ¼ of Sec. 30, T. 63 N., R. 11 W., Duluth land district, Minnesota.

* * * * * *

A hearing was had, and much testimony taken. The Register and Receiver decided against the contestant, and recommended a dismissal of the contest and the patenting of Warren location. The contestant appealed. Your office confirmed the judgment of the local officers. The contestant now appeals to the Department.

I will briefly go over the facts of the case. It has been the subject of two appeals to the Department, and has been twice argued orally.

It now comes before the Department after all the facts have been brought out in the testimony, and fully elucidated by the arguments of counsel.

* * * * * * *

I am therefore of opinion that the decision of your office, affirming the action of the register and receiver in dismissing Hartman's contest, should be affirmed.

It appears that Thomas W. Hyde appeared at the hearing before the local officers, and sought to introduce testimony to establish a pre-emption claim to a part of the land in controversy, to wit, the N.E. ¼ of the S.W. ¼ of said Sec. 30. The register and receiver declined to receive the testimony offered, or to admit Hyde as a party to the hearing, which was affirmed by the decision of your office under consideration. Hyde appeals to the Department.

There must necessarily be somewhere a termination of all controversies. If there ever was a case before the Department to which the doctrine of *res adjudicata* is applicable, it is the case of Mr. Hyde. He has had no less than four hearings before the Department, on appeal or on review, and he now presents himself for the fifth time with a persistence which is worthy of admiration.

In Hyde *v.* Warren, on review (15 L. D. 415), it is said:

The right of Hyde as a pre-emption claimant under the settlement upon which he bases his claim to this land was involved in the case of Hyde *et al. v.* Eaton *et al.*, decided February 18, 1889 (not reported), and again, on motion for review, on January 28, 1891 (12 L. D. 157). It was there found that this settlement was not made in good faith for his own use and benefit, and that he therefore acquired no rights by virtue of that settlement. That decision disposed of his claim, not only as to the particular tracts of land involved in that case, but also as to all the tracts which he claimed under that settlement; that is, his claim as a whole was held to be invalid, after a full inves-

tigation and opportunity to Hyde to be heard in defense thereof. This being the case, it was wholly unnecessary to again go over the same ground, when some other person, not a party to the former proceedings, presented a claim to part of the land. It was not error to dispose of Hyde's pre-emption claim, as was done in the decision complained of, by citing the former decision of the Department, holding it invalid.

There was therefore no error in the decision of your office, in holding that the matter was *res adjudicata*.

The judgment of your office is approved and affirmed.